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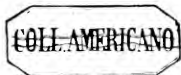
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COMMENTARIES

ON

UNIVERSAL PUBLIC LAW.

CHAPTER I.

INTRODUCTION.

THOSE who have thoughtfully observed the events of our own time, especially during the last six years, may apprehend, not without some show of reason, that in a great part of the world permanent government on any fixed principles of Public Law is becoming extremely difficult, if not impossible.

On the conclusion of the Treaty of Vienna, it seemed strange that the French Revolution and the conquests of Napoleon should have produced such small tangible results. One single new dynasty, that of Sweden, remained; the constitution of Germany was remodelled; and two republics were extinguished. But a transition in the history of Europe had commenced. The minds of men had been unsettled by a period of anarchy denying everything and spurning the very idea of obedience; and then came a time of military despotism, the very type of power,—the *majestas* of government unmitigated by any checks or restraints.

We see in our time a reproduction of those phenomena, but with very peculiar and curious circumstances.

The revolution which overthrew the house of Orleans was effected not so much by its own power as by the unsoundness of the system which it destroyed. That revolution was grounded on no principle and on no definite want; consequently, the results came by a sort of chance. The very leaders of the movement were unprepared to commence any new system, because they were not at the head of any party in the country contending for a practical object, such as the

redress of a given grievance, or the attainment of some specific improvement in the economy or government of the nation. Paris and France fell into the hands of a successful orator and a knot of worthless adventurers; and then commenced a strange caricature upon statesmanship, showing very strikingly with how little wisdom a great nation can be governed, even during a time of the highest civilization.

In this uncertain state, when France had accidentally got a republic which she did not want,—and no one could say for what purpose the monarchy had been overturned,—it was imagined that in the midst of the despotism of the Provisional Government, the nation was to determine its future Civil Polity, by means of a Sovereign Constituent Assembly chosen by universal suffrage.

The revolution itself being without any practical public object, it followed that the Constituent Assembly had no basis of Public Law to work upon. It had to invent everything;—not only to erect a new edifice, but to discover a new style of architecture, and new purposes or uses for the building, pointed out by no previous want. The result was an absurdity. Whereas all statesmen and public lawyers had thought that a republic should be cunningly devised so as to afford checks and counterpoises to the different powers of government, keeping them in their right places and preventing all irregular action, it was on the contrary determined that the nation should be governed on an opposite principle. The theory was propounded, that, to prevent any violence or convulsion, all resistance or restraint must be removed. The nation was to be treated like a dangerous lunatic, who is placed at liberty in a room covered with soft cushions, where he may give vent to every impulse without injury. But we will not enter into a criticism of that absurd creation of Monsieur de Lamartine and his colleagues. Our object must be to consider the nature of the means by which the Republic was erected, namely,—the Constituent Assembly.

When these events took place, a disposition had been manifested by the governments of Italy and Germany to accord what are called liberal institutions to their subjects. A good deal of enthusiasm had been raised. Perhaps neither the sovereigns nor the subjects saw very clearly what results they were coming to. The principles of Public Law were little understood, and men did not clearly see what practical objects they themselves had in view, or how these were to benefit the community. Liberty was worshipped as an unknown goddess, or a beautiful myth, to which every man attached whatever ideas were most agreeable to his wishes or his fancy. In short, nothing could be more different from the material epochs of our own constitutional history, in which we always see clearly defined objects

contended for, and definite principles of Public Law asserted and disputed on either side.

One important characteristic of that time was, that there existed comparatively little commanding talent on the continent of Europe. There was a want of those great and powerful minds which seem to control the course of human events. In Italy especially, public opinion was deified. No statesman had the power to direct public opinion; and those who seemed to lead it, such as Gioberti, were in reality only its organs and its flatterers. And indeed, the fact that so shallow and vague a writer obtained a very great share of popularity and power, in itself characterises the times.

Under this state of circumstances, almost every country on the continent fell into a more or less servile imitation of France. The mob of the capital assumed supreme authority over the nation, and decreed that their sovereign had ceased to reign. Louis Philippe had laid it down that no king could continue on the throne who had fired on his people; but the converse of that proposition has been established by subsequent experience. The only question everywhere was, whether the troops would act, and could act effectually? Day by day it was solemnly announced to the world, that *tranquillity reigns* in this or that capital, which meant that the city was in the possession of the mob and the sovereign a fugitive.

Then was the period of Provisional Governments, and, in imitation of France, a general cry for Constituent Assemblies followed. The king of Sardinia had given free institutions to his own subjects, and had marched to assist the Lombard insurrection. The spirit of servile imitation was so strong, that it was determined by the Piedmontese Parliament that, on the successful termination of the invasion, a Constituent Assembly, elected by universal suffrage by Piedmont and Lombardy, should determine the future constitution of both. It is evident that if this had been effected, the only resource of the king would have been to rely on his victorious army against the Republic created in the very bosom of his monarchy. But it seemed an established principle of Public Law that no form of civil polity, however well adapted to the purposes of government, could be lawful unless it had been invented and agreed to by a Constituent Assembly.

In the midst of all this confusion an attempt was made in Germany and in Italy to solve the difficult problem of a federal democratic constitution; but, here again, instead of resorting to America, where it had been already tried—instead of going to Kent and Story and the Federalist,—they fell into a servile imitation of the French method of making constitutions, by means of provisional governments and constituent assemblies. From this, however, posterity may derive some

benefit (if it be true that nations learn by experience), for the utter absurdity of those assemblies has been established by the experiments tried within the last few years all over Europe. But to this subject I shall return.

Much may be learned by a careful study of events since the year 1848, for they present an extraordinary variety of political and legal phenomena. Yet we must admit that the attempts made during the period in question to establish constitutions, wherein, as Fortescue says, the sovereign power is restrained by political laws,^a were attended by many unfavourable circumstances. And, accordingly, only two of those constitutions—those of Sardinia and Hanover—survive. The former was probably saved by the failure of the two invasions of Lombardy, and by the good sense with which the government declined to join the Italian constituent assembly.

Among the unfavourable circumstances of the times, none was more powerful than the existence of the Socialist and Red Republican party, to whom the French Revolution of 1848 had given great power and activity. We will not attempt any analysis of the different opinions comprehended within those general denominations; suffice it to say, that they are either hostile to or incompatible with the existence of any government, and strike at the very root of the Secondary Natural Law; but they are recommended to the discontented multitude, who, as Hooker observes—"Know the manifold defects whereunto every kind of regiment is subject; but the secret lets and difficulties, which in public proceedings are innumerable and inevitable, they have not ordinarily the judgment to consider."^b These opinions have no doubt been embraced by considerable bodies of men on the Continent, and are propagated with much zeal and ability by their leaders. Even in this country the tenets of Socialism are not unknown, and some of the peculiar terms and phrases, at least, of the sect, have been adopted by well-meaning persons, who, perhaps, do not see the danger of being led further by notions which are adorned with a fair show of Christian philanthropy.

That the existence of the Socialist party in Europe is, and must be, more and more one of the chief difficulties of civil government, can scarcely be doubted. That party strives for a total alteration of civil society, and the other institutions from whence Secondary Natural Law arises, and for the subversion of any government not based on certain impracticable doctrines. And all this is clothed with pretences of philanthropy, and the greater welfare of the greatest number,

^a Fortesc. de Laud. chap. 9.

^b Hooker, Eccles. Polit. book 1, § 1.

highly attractive to the minds of many, especially the large classes, who, in all countries and at all times, are more or less suffering.

The effect of all these things on the minds of the better educated classes—those who have property, and whose welfare depends on the stability of laws and civil power—is very important. They feel the want of that *certainly of duration*, without which municipal government cannot be said to fulfil adequately the very first objects of its institution. They desiderate above all things a powerful government—a sovereign power, able at all times to protect them. And thus there is now, among those who are called the party of order on the Continent, a tendency, more or less strong, towards despotism. Those who are in possession of power feel naturally loath to part with it: and so it comes to pass, that the distinctive feature of the system prevailing in the greater part of Europe is, government by means of standing armies, with a ready appeal to Martial Law, or what is technically called the state of siege.

Acts of state are no longer judged according to the ordinary rules of Public Law. Policy, real or supposed or pretended, overrides Law. A *coup-d'état* is no longer held anything very extraordinary. *Salus populi suprema lex esto*, seems to have become an ordinary maxim of government, rather than an exceptional principle, to be kept among the arcana of state for rare cases of emergency.

The state of those affairs which appertain to the international branch of Public Law has of late years been equally remarkable. We have seen diplomacy turned to purposes beyond the recognized scope of diplomatic functions—involving something very like what has been called political propagandism, and dealings with parties or factions for the purpose of producing political changes in the internal government of countries. We have seen a revolutionary government in Italy suppressed by a foreign invasion, unauthorized by any treaty, or by any request of the lawful Sovereign. And then the invading power has been recommended and pressed not to permit that Sovereign to return to his dominions, except under conditions regarding the internal management of his government and the exercise of his undoubted prerogative.

Of the policy of these things I say nothing; I only look at and refer to them as facts material with reference to the present practice of International Law.

The inference drawn by some from all the various circumstances referred to and the present aspect of public affairs is, that Public Law must now be treated as a thing obsolete and cast aside by the common consent of European statesmen. And it may indeed seem, that in our times those who are entrusted with government in the greater part of

Europe, can scarcely be expected to do more than meet, by energetic action and commanding force, the dangers or difficulties which from time to time arise; and that vigilance and power must take the place of law, and even of justice. And so the uncertainty of governments renders the practice of International Law, in many cases, subordinate to state craft.

But this notion, which would throw back European civilization in one of its highest branches for many centuries, seems to me both shallow and unsound. The reader will remember that fine passage in Grotius, where he laments the readiness with which nations went to war on the smallest pretences, and the lawless manner in which they carried it on when once the sword was unsheathed. He does not draw the conclusion from thence, that, because, as Cicero says, *Silent leges inter arma*,—because nations seemed bent upon referring everything to the tribunal of force and blood,—therefore the *jus gentium* was a mere dream or a philosophical hypothesis, useless to practical men. On the contrary, he tells us that this, which he calls horrible barbarism, was one of his chief inducements to write his glorious book on the Laws of War and Peace.*

And of all times, perhaps, in modern history, the present is that in which especially it behoves thoughtful men to investigate the science of Public Law. When society and property, and that due subordination of persons without which neither can exist, are perseveringly and ingeniously attacked, it becomes important to know scientifically the grounds and reasons of those institutions from whence spring the great branches of Secondary Natural Law, and to see the consequences to which they lead. When the insecurity of human government in a great part of the civilized world seems to make political institutions as changeable as the scenes of a theatre, and drives men to throw themselves into the arms of any power that appears to promise protection from perpetual revolutions, it is surely interesting and useful to study the laws on which the different forms of political society are constructed, and the reasons of those laws. And when the mutability of governments and constitutions, and the sense of danger in most countries felt, renders the practice of International Law irregular and uncertain; then especially the grounds of that law and the legal principles on which the relations of different human societies with each other should be regulated, ought to be learned and studiously considered. And, indeed, as in a time of general sickness the cultivation of medicine is particularly important, so at a period of political distempers it is most useful to investigate those principles whereby they may be cured or prevented.

* Grot. de Jur. Belli et Pacis Proem. §§ 29, 30.

Another circumstance of the present time renders the study of Public Law especially important. Many things concur to show that European society is in a state of transition. Opinions are singularly undefined and variable. And yet there are forces arrayed against each other so powerfully, that it is difficult to say which will in the end prevail. A multitude of experiments in government have been tried within the short space of three years, of which very few can be said to have met with any success whatever. Aristocratic institutions, which have hitherto been so great an element of stability, by supporting the executive and influencing the democracy, are everywhere giving way or perishing. In France, the aristocracy, which might have been like piles driven into a quicksand, has succumbed to the operation of a despotic and luxurious court—an emigration—a military tyranny, and three revolutions. The spirit of hostility to aristocracy has vibrated from thence throughout Europe.

The Roman Catholic Church alone presents an extraordinary spectacle of the stability denied to human institutions. Her form of polity is the most ancient in the world. The Venetian republic boasted the singular honour of a constitution which had lasted a thousand years; but Venice has perished—while the constitution of the Church remains intact and vigorous, after the lapse of eighteen centuries, during which it has undergone no organic change. Its divine origin and authority, and the truth of the faith which it teaches, sufficiently account for this immunity from the common lot of other institutions. We are here to consider only its effect upon political communities, regarding its institutions and laws as part of the Public Law of Europe. Giving the sanction of religious teaching to morals and natural law, and the principle of authority and obedience; exercising a strong influence over intellectual civilization and all the relations of life, and presenting to the eyes of men a regular society, governed by a complete system of machinery, complicated yet simple, and tried by the experience of ages, the Church must be the strongest support to human government. And belonging exclusively to no one country, but everywhere formed in the same mould, regulated by the same laws, and imbued with the same principles, the Church must also be the strongest bond of union common to the whole human family on earth, and the universal vinculum of human society.

The Church was not intended to supersede the civil magistrate and temporal government: each has its proper province in the system whereby the world is governed: but if every human government were extinguished, the Church would supply a form of external polity capable at least of keeping human society from dissolution and ruin.

The operation of this great power upon the present state of man-

kind is one of the most important problems of Politics and Public Law. I however now only refer to it in order to show fully that which has been described as a state of transition, in which it seems to be the only permanent element, while all the rest is constantly changing and moving on to some distant unknown point.

What I have said applies chiefly to foreign countries; for a variety of causes have rendered the civil polity of this kingdom the most striking exception to that constant series of fundamental changes which characterize the legal and political history of our times. Yet when we consider how the events and institutions of one country act more and more on those of others, we must feel how important the various matters to which we have referred must be for ourselves, even where their more immediate bearing is on other nations. And changes in foreign states, but especially in France, naturally suggest speculations and opinions regarding laws and institutions here, raising the hopes and fears, and unsettling the minds of men.

Hence it becomes in our times more and more useful for English lawyers and statesmen, and others engaged in public affairs, to make themselves acquainted with the principles and reasons on which human society, with its innumerable consequences, are based. The whole system of the external government of mankind depends on those principles and reasons. The very institution of property, from whence springs the greater part of private law, is based upon them. And so Hermogenianus, in the Pandects,⁴ refers to one origin (the *Jus Gentium*) a variety of things, some appertaining to public and others to private law,—such as the distinction of men into nations, the foundation of kingdoms,—the limitation of boundaries to lands,—dealings between men, contracts, and obligations.

What is called the progress of laws and institutions must be governed by the reasons and principles to which I have referred, or it will violate some law of the immutable class and produce evil. And at a time like the present, when civil government seems so precarious in a great part of Europe, and the institutions of human society are everywhere ingeniously and indefatigably misrepresented for revolutionary purposes, it behoves all those who have any share in making or administering laws, to be well grounded in the soundest doctrines of Public Law, whereby they may meet this mischief and prevent the successful diffusion of those dangerous theories, and at the same time discern changes which may be safely and advantageously made. To lawyers the study of Universal Public Law must be especially and deeply important. A slight knowledge of the Reports suffices to show how

⁴ L. 5, ff. De Just. et Jur. And see the comment of Cujacius thereon, tom. 7, col. 30. Edit. Venet. Mutin.

often the Law of Nations, and other branches of Public Law, are resorted to in the administration of justice. I refer to the Common Law and Equity Reports, for it is superfluous to say anything of the Admiralty Reports, and especially of Lord Stowell's decisions.

In *Conn v. Blackburn*, Dougl. 619, Mr. Law, afterwards Lord Ellenborough, arguing in an action of assumpsit, before Lord Mansfield, cites Grotius, and refers to the question agitated by Quintilian and commented on by Pufendorf, regarding the instrument of obligation from the Thebans to the Thessalians, found by Alexander the Great upon taking Thebes.

In the case of the *Duke of Brunswick v. The King of Hanover* (6 Beav.), the most abstruse doctrines of Public Law regarding the immunities of a sovereign prince in a foreign country were considered.

And in the older books, the case of Monopolies (11 Rep. 85) is discussed on grounds of Public Law. And so *Calvin's case* (7 Rep. 1) is full of points of Public Law, as, for instance, when it is held that the highest and the lowest dignities are universal; for, if a king of a foreign nation come into England by leave of the king of this realm, he shall sue and be sued by the name of a king, for he is a king here, whereas a foreign duke or other nobleman has no such privilege, but is a commoner here.

The multitude of cases wherein this kind of learning has been used in the Courts of Common Law and Equity, renders any further reference to them unnecessary here.

With regard to our treatises and text books, Fortescue, in his work *De Laudibus Legum Angliæ*, enters, especially in the tenth and following chapters, into disquisitions on the first origin of kingdoms and nations and other questions of Public Law,—citing St. Thomas Aquinas, *De Regimine Principum*, and St. Augustine, *De Civitate Dei*. And Blackstone's Commentaries are full of luminous discussions of the same nature. Lord Hale, in the tenth chapter of his Pleas of the Crown, expounds the Law of Allegiance, not only with English authorities, but referring also to the Law of Nations. And I need scarcely remind the reader of Butler's note to Co. Litt. 261a, on the *Jus Maris*, where he learnedly discusses the celebrated dispute of Selden and Grotius on the liberty of the seas, and Bynkershoek's treatise on the Rhodian Law.

In the face of these authorities, and the many others that might be added, it is impossible to deny that Public Law ought to be part of legal education here.

The present prospects of the legal profession render this proposition still clearer. What will be the ultimate effect of the New County Courts on the administration of justice, and what the precise result of the changes which they are directly or indirectly bringing about, it

may at present be difficult to say with much confidence. But this new form of judicial polity must in all probability not only break that system of concentrating the bar in London, which was believed to conduce so much to its dignity and importance, but in divers ways diminish its emoluments. That this is a severe trial to the legal profession, not only individually but as a body, no one can deny. Superficial observers may perhaps say, that this is of no consequence to any one but to lawyers, and that the change must be one of unmixed advantage to the nation at large. But whoever considers that the great leading principle of our constitution is *government according to law*,—and that “the Common Law is the greatest inheritance that the king and the subject have,” must perceive how deeply important is the maintenance of that body from whom the judges of the land are selected, and who with them are entrusted with the administration of the law.

It is impossible to doubt the value of those reforms having for their object the cheap and speedy administration of justice; but, like other inventions of human wisdom, they are not unaccompanied with certain dangers of inconvenience. And those dangers must be met, not only for the sake of the legal profession, but for the love of our country. If ever a time should come when the bar of England has fallen into a vulgar mediocrity, with no more learning than is necessary to earn a daily subsistence, unadorned by great legal science, dignity and independence,—then the constitution of this country will be in imminent peril. And this may come to pass, unless care be taken to provide a remedy against the circumstances of the times just adverted to, by raising as high as possible the standard of legal education.

Barristers will probably not in future make very great and rapid fortunes, and so be the founders of powerful families among the landed aristocracy. But this need not necessarily lead to the decay of our order. In the first of the celebrated letters of Camus on the Profession of an Advocate, he tells the young candidate that the exercise of that profession leads rather to honour than to fortune; and yet at the time when he wrote, the French bar was in a high state of importance; and this shows that the diminution of professional emoluments need not necessarily be prejudicial to the status and public utility of the bar. But that diminution must be counterbalanced by an increase of learning.

In future lawyers must fit themselves, not merely to earn their bread by the practice of the law in the particular branch which they especially follow, but they must apply themselves to the general study of the law in all its branches with a more comprehensive spirit, and thereby not only enlarge their professional sphere of knowledge, but

also qualify themselves to perform the duties of legal statesmen in parliament, and in the general business of the country. For this purpose they must extend their learning, so as to embrace the whole range of the legal science; and such is the wonderful harmony of Universal Jurisprudence, and the connection of all its parts, that they will find even their special cultivation of certain branches of law facilitated by the study of the science as a whole.

But these Commentaries are designed not only for lawyers by profession, but for all who have any concern in the administration of public affairs. For our reflections on the political events of late years show clearly how much the practice of Public Law has lately been left to chance; and how principles have been neglected or violated by a blind following of what has been called public opinion, which has brought about the necessary result of government by force of arms and vigorous measures of repression. And these remedies have been received with acquiescence, if not with thankfulness, by people who feared an overthrow of all government and the dissolution of human society.

Although the science of politics, based on experience and prudence, is distinct from that of law, yet we shall see how the two sciences are linked together, and that the same spirit of justice must preside over both, so as to cause a harmony and unity in the scheme or system whereby mankind are governed under Divine Providence. If it were otherwise, we must embrace the false doctrines of the Manicheans, who recognised two powers, one good and the other evil, dividing between them the government of the world. It follows, that as the administration of human affairs is conducted by both those sciences, and as they must have the same end by Divine appointment, so their principles must be consistent, and the rules of one of them cannot be violated without injury to the other, and prejudice to the interests of mankind.

These reflections show how necessary Public Law is to politics and statesmanship. For as St. Thomas Aquinas says, "the government of particular states must be modelled on that of the world." And therefore the rules of practical government are derived from principles belonging to the original design of human society, and from natural law, which points out the state prescribed by the nature of man and the will of the Creator. From thence springs the whole science of Public Law.

These observations will give an idea of the plan of our Commentaries on Universal Public Law. But some further explanation may be requisite to show their scope and use.

Public Law, in its widest sense, includes International Law. But the latter is so vast and complicated, that it requires to be treated as a

distinct branch of jurisprudence. In these Commentaries it is often adverted to, but not fully and professedly explained. International Law is founded on the great principles of jurisprudence, and the laws on which human society is constructed; and it can never be fully understood, without a knowledge of the juridical nature of the communities called nations, or states, with their essential organic laws, and their relation to the government of mankind. These Commentaries, therefore, contain the sources of the Law of Nations, and the doctrines from whence its most important parts are deduced. But we have here chiefly in view, Public Law in the more confined sense of the term, that is to say, without International Law.

The object of these Commentaries is to explain the origin and structure of universal human society, and of the different kinds of communities into which it is divided, in order to show the system by which the world is governed, and the principles on which that government is grounded, and whereby it is regulated. This investigation will facilitate the solution of many difficulties in the sciences of jurisprudence and government, and refute errors and false doctrines prejudicial to the peace and welfare of society.

The leading practical idea in the science of universal Public Law, is to view mankind as governed by laws and obligations. It regards mankind as an aggregate divided into particular communities, or bodies politic, and forming an universal system in this world, regulated and governed by an infinite variety of laws, which, notwithstanding their great diversities, are capable of being classified and arranged so as to show how the different sorts of laws work, and what principles in them are essential or useful, or prejudicial to the interests of society; and these laws are connected, in a multiplicity of ways, with religion and morality, and with politics and those different sciences which relate to the intercourse of mankind, and the uses of all things in the world.

Such is the general spirit of this book. It is entitled, Commentaries on Universal Public Law, because it is not confined to the Public Law of any particular country, but embraces that of human society in general throughout the world, including the foundations of International Law.

This vast subject is here treated on a method of development from fundamental principles. Thus we have commenced with an exposition of the origin and foundations of law, and then proceeded to show the plan of society on the foundation of those two great primary laws on which all others depend. Then follows a full explanation of the nature and spirit of laws and their different kinds. And as the laws of man are the rules of his conduct, and that conduct consists of the steps

which he takes towards his end,* which is also the ultimate end of human society; this investigation includes the most essential parts of the government of mankind. And it also shows the connection of Public Law with all the other parts of universal jurisprudence. We then proceed to the detail of Public Law, the elements or parts of human government, and the different forms of civil polity, with the legal reasons and principles belonging to them.

Such is the general scheme of these Commentaries. On every material point abundant references to authorities are provided. Thus the reader will be able to prosecute his inquiries by tracing our propositions and arguments to their sources, and at the same time to judge in doubtful questions on which side the weight of authority preponderates.

The author is encouraged by the circumstance, that there does not exist in the English language any treatise on this—the highest and most abstruse part of temporal jurisprudence; and therefore the novelty of the undertaking may recommend it, and also be some excuse for its imperfect execution.

The reader need not be deterred for want of previous legal knowledge from using these Commentaries. They are written not only for lawyers but for all persons interested in government and public affairs. Therefore everything is here explained in simple language, avoiding technical terms as much as possible: and the elementary parts are sufficiently complete to render the remainder easy. And indeed those elementary portions of the work may serve as an introduction to other branches of law: for they contain the fundamental principles on which all jurisprudence is built.

Care has been taken to avoid partizanship and political bias. All questions have been considered legally and philosophically on their own merits. Yet reference is freely made to events of our own time wherever they seemed calculated to illustrate the matter in hand, and give a practical character to theories and arguments. Much use is made in the following pages of the great constitutional legal writers of that wonderful Republic, to which we are bound by so many ties both of race and interest. They are not known in this country so generally as their learning, profound reasoning, and wisdom deserve: and some of their most valuable arguments and opinions have therefore been transferred verbatim to this book. It has also been endeavoured to take as wide a range as possible in choosing the materials of this work. Civilians, canonists, jurists, theologians and political writers, ancient and modern, have been freely used, that the reader might be

* Domat, *Loix Civiles*, *Traité des Loix*, ch. 1, § 3.

furnished with abundance of authority, and introduced to many sources of learning. Three years of constant labour have been consumed in the composition of these Commentaries, which I now present to the public, in the hope that so new and difficult an undertaking will be indulgently received as a zealous effort for the advancement of knowledge.

CHAPTER II.

THE ORIGIN AND FOUNDATION OF LAW.

THESE Commentaries have commenced with a general consideration of the relation which Universal Public Law—that branch of jurisprudence which contains the laws whereby human society is formed and governed—bears to the history of our own times and the present state of European affairs.

Before we proceed to a nearer inspection of this part of general jurisprudence, some investigation of the nature and properties of laws will be necessary. The reason is, that the science of universal jurisprudence comprises all those rules of conduct or laws, whereby the human race is under Divine Providence governed; and if laws be considered in this light,—that is to say, not as establishing or defining certain specific legal relations, and so constituting the rights of individuals, but as rules of human government,—all laws come within the sphere of Universal Public Law. And this is one link between Public Law and every other branch of jurisprudence.

And thus Savigny,^f after saying that law is divisible into two branches,—Public and Private,—goes on to say:—"The former has for its object the state, that is, the organic manifestation of the people; the latter embraces the legal relations between individuals, and is the rule or expression of those relations. But those two sorts of law have many points both of resemblance and of contrast. Thus the constitution of the family,—the authority of the father, and the obedience of the children, bear a striking analogy to the constitution of the state;^g and many corporate bodies have nearly the same legal condition as individuals. But what distinguishes public from private law is, that the former relates to the aggregate of society, and con-

^f *Traité du Droit Rom.* tom. 1, chap. 2, § 9. Trad. par Guenoux, 1840.

^g St. Thomas Aquinas makes the same observation. *Opusc. De Regimine Principum*, lib. 1, cap. 1, in fin.

siders individuals in a secondary light; while the latter is directed to the individual exclusively, and concerns itself with his existence and his different legal states." These profound observations of the great German civilian, which form a good commentary on the celebrated law of Ulpian in the Pandects distinguishing public from private law,^b show that if a law be considered in its relation to the commonwealth, that is to say, simply as a law, it has an aspect relating to public jurisprudence, though its object be private. And thus Papinian describes law as follows :—

"Lex est commune præceptum." * * * * *

"Communis reipublicæ sponsio"^c

Such is the light in which I intend to contemplate and explain the nature of laws. This preliminary disquisition will not only lead to a clearer knowledge of Public Law, but also enforce the great principle, that universal jurisprudence, comprehending all laws, is one science composed of branches intimately connected one with the other, though to the superficial observer quite separate and unconnected.

Our chief guide will be Domat, of whom the Chancellor D'Aguesseau^d said, that no one had ever given a better plan of human society and the origin and nature of laws. He has, indeed, been blamed by Professor Lerminier, and other modern writers, for mingling law with Religion. But the following observation of the great canonist Zallinger^e shows that criticism to be unsound and shallow. He says, that some writers on natural jurisprudence fall into error at the very outset of the science, by taking a maimed and imperfect view of the nature of man, and referring all that man ought to regard in the observance of natural laws to this temporary life only, and to its interests; and so they deem themselves more philosophical, in proportion as they separate Religion from Natural Law.

Domat commences his argument thus, "We cannot take a more simple or a surer way for discovering the first principles of laws, than by laying down two primary truths, which are only bare definitions. One is, that the laws of man are the rules of his conduct, and the other, that his conduct is nothing else but the steps which a man takes towards the end for which he was created."^f

And we find the same principles in Pufendorf, where he says, that

^b L. 1, § 2, ff. De Just. et Jur. And see Bracton, De Legib. lib. 1, c. 1, §§ 2, 3.

^c L. 1, ff. De Legib. et Senatuse.

^d D'Aguesseau, Œuvres, tom. 1, p. 273. The chancellor mentions that the work was composed under his own eyes.

^e Zallinger, Instit. Jur. Eccles. in Decretal. Prolog. cap. 2, § 7, p. 8.

^f Domat, Loix Civiles, Traité des Loix, chap. 1, § 3.

the dignity and excellence of man require that he should conform his actions to a certain rule, and that our soul is given to us whereby we know the rule, not merely to animate the body, and preserve it from corruption, but in order that, by the good use of our faculties, we may serve our Creator, and also render ourselves happy.^a

Now these first notions of law show that it is impossible to separate the fundamental doctrines of jurisprudence from Religion, unless you throw out of your consideration the more excellent part of man and the only permanent existence of which his nature is capable. To do so would be a radical error, for as Zallinger truly observes, nothing is more important in teaching the fundamental principles of law than to consider the nature of man both correctly and completely.

It follows, as Domat teaches, that in order to discover the foundation of the laws of man, it is necessary to know what is his end; because his destination to that end will be the first rule of the way which leads him to it, and consequently his first law, and the foundation of all the others.

This, which we may call the directive aspect of law, is to be found in the celebrated definition of St. Thomas Aquinas. *Lex est quædam regula et mensura secundum quam inducitur quis ad agendum, vel ab agendo retrahitur.* Suarez^b observes that this definition includes not only men but animals and inanimate things. And so it is, because those creatures are governed by rules directing them to their end, which is the purpose for which they are made.^c And those rules may be called laws, if (as Hooker says) we apply the word law not to that only rule of working, which a superior authority imposes by way of obligation, but in the more enlarged sense in which any kind of rule or canon, whereby actions are framed, is called a law. Both kinds of rules have this in common, that they direct things or persons towards the end for which they are created.

Before we learn from Domat how the two fundamental laws given to us in the Gospel are derived from the end of man's creation, it will be useful to see how Pufendorf and Grotius have deduced the origin of law from the nature of man.

The former examines very judiciously the question, whether it would be consistent with the nature of man to live without any law.^d

The question arises thus. As God has given free will to men, that is to say, the faculty of bringing their minds, by an interior movement,

^a Pufend. Dr. des Gens, trad. par Barbeyrac, Liv. 2, ch. 1, § 5.

^b Suarez, De Leg. lib. 1, cap. 1, § 1. And see Hooker, Eccles. Polit. book 1, § 3.

^c Suarez, ubi supr. et lib. 2, cap. 3, § 12.

^d Pufend. Dr. des Gens, l. 2, ch. 1; per tot. Grot. D. de la G. & de la P. l. 1, Disc. Prelim.

to whatever they approve, and rejecting the contrary, it has been doubted whether it would not have been conformable to the goodness of the Creator to leave them in the full enjoyment of their liberty of will. Man is gifted with a greater power of free will than any other animals possess, and yet he is fettered on all sides by obligations, and is therefore less free than they.

The answer to this difficulty is in the proposition, that liberty without limit would be not only useless, but also pernicious to human nature; and that therefore our own interest requires that our freedom should be restricted by some law. This principle is also important as giving a clue to the question, how far free-will may reasonably be left without bridle.

Suarez* accordingly shows that law is necessary. He argues that law is not absolutely necessary in itself, because God does not require law, and a law supposes something created, to be governed thereby. And a law, properly so called, supposes the existence of a rational creature, because it must be imposed on free will and free acts. But he concludes, that assuming the creation of rational beings, a law is not only useful but necessary to direct them to good and restrain them from evil, and that they may live in a manner conformable to their nature. Man is an intellectual creature and has a Superior, under whose providence and rule he is placed, and being intelligent, he is capable of moral government; therefore, Suarez argues, he must be subject to the will of that superior whereby he is governed by law.

With regard to animals, their condition is very inferior to that of man, and they can be subject to no law, properly so called, in their relations with each other or with man, and thus they have liberty independent of law. The reason is, that they have not souls capable of perceiving and knowing right or obligation.[†]

There is, however, a law of Ulpian in the Pandects where he speaks of a natural law common to men and all animals:—"Jus naturale est quod natura omnia animalia docuit. Nam jus istud non humani generis proprium sed omnium animalium quæ in terra, quæ in mari nascuntur, avium quoque commune est. Hinc descendit maris atque fæminæ conjunctio quam nos matrimonium appellamus: hinc liberorum procreatio, hinc educatio: vidimus etenim cætera quoque animalia feras etiam istius juris peritiam censi."[‡] And he then goes on to say that the *jus gentium* differs from natural law, because it is exclusively belonging to mankind; that *jus gentium* is the true natural law.

This celebrated text of the Pandects requires some explanation here.

* Suarez, De Leg. lib. 1, cap. 3.

† Pufend. lib. 2, ch. 1, § 4.

‡ L. 1, § 3, ff. De Just. et Jur.

Savigny observes,* that, in the writings of the Roman juriconsulti, we find two great divisions of law considered with reference to its origin. The first is bipartite. It is this:—1st. *Jus civile*—the law peculiar to the Romans. 2ndly. The *Jus gentium*, or, *Jus naturale*—which is common to all men. The second division is tripartite, that is to say:—1st. *Jus civile*—the law belonging to the Romans. 2ndly. *Jus gentium*—the law common to all nations; and 3rdly. *Jus naturale*—the law common to men and to animals. The learned writer is of opinion that the first of these two classifications is the only rational one, expressing the true doctrine of the Roman Law, while the latter is an attempt at a more extensive classification, which has not been generally recognized, and has had no influence on the doctrines of the Roman Law.

The Institutes of Gajus throw light on this subject. He represents the *jus gentium* as the primitive and most ancient law founded on *naturalis ratio*.[†] He also calls it *jus naturale*; and when he speaks of the natural modes of acquiring property, or the ownership of things, he refers them indiscriminately to *jus naturale* and to *naturalis ratio*.[‡] And the principle laid down by him (which is also in the English Law), that the property of the soil carries with it that of the buildings, rests both on the *jus civile* and on the *jus naturale*. And Gajus calls agnation and cognation—"Civilia et naturalia jura."[§] Thus it appears that Gajus clearly lays down the bipartite division of law. It is also followed by Modestinus, Paulus, Marcian, Florentinus, and Licinius Rufus, as Savigny shows.[¶]

The tripartite division is explicitly taught by Ulpian, Tryphoninus, and Hermogenianus. Savigny is of opinion that it rests on the following hypothesis. There was a time when the mutual relations of men were only those which exist among animals. Then came the period when civil government, slavery, private property, and obligations were uniformly established among men. Later still, the modifications of general law; and new institutions formed in each state peculiar laws.

This hypothesis is evidently not founded in fact, at least so far as regards the first period, and it is useful only to explain the legal doctrine of Ulpian. Donellus says that Ulpian speaks by way of figure of speech, meaning, not that there can be any law among beasts (who

* Savigny, *Traité du Droit Rom.* tom. 1, Appendice 1.

† Gajus, 1, § 1; l. 9, ff. De Just et Jur.; l. 1, ff. De Acquir. rer. domin.

‡ L. 1, ff. De Acquir. rer. domin.; Gajus, 2, § 65, 73.

§ L. 2, ff. De Superfic.; Gajus, 1, § 158.

¶ Savigny, *ubi sup.* p. 407.

are incapable of obligations), but that there is among them a similitude of law in the relations which are governed by instinct and natural impulses, and so resemble those of mankind.* Savigny defends Ulpian in the same manner. He lays it down that every legal relation has for its basis some fact on which it arises, and to which the law applies. In most legal relations, the given matter, that is to say, the fact, such as ownership and contracts, is not so necessary that the human species could not subsist without it. But with regard to those relations which are common to mankind and to animals, it is different, for they are necessary to the continuance of the human race. Therefore those legal relations are common to men and to animals in a certain sense. This view of Ulpian's doctrine gives it its true use and value. Savigny observes that the Roman juriconsulti were no doubt led to this notion by seeing that certain institutions belonging in common to all nations must be regarded as more or less natural. But he rejects the tripartite division as a mere individual theory of Ulpian, while that of Gajus is the true principle of Roman Law.

In substance Cujacius does not differ from Savigny. He says that many things which men do under the guidance of reason, and obeying an obligation of natural law, are done by animals by instinct and natural impulse, and that in this sense there is a law common to men and beasts. The same doctrine is taught by the great canonist Reiffenstuel.^d And, indeed, Cujacius carries the doctrine rather further by citing an observation of Polybius, that even monarchy (which is a part of the *jus gentium*) is common to men and some beasts,^e for many animals have their leaders whom they obey.^f

This explanation of Ulpian's doctrine respecting natural law is important, not only because the subject has been much considered by the learned, but as illustrating the value of the method introduced by Cujacius, who is not satisfied with taking the body of civil law compiled by Justinian as a whole, but investigates the separate texts of which the Pandects are composed, and so discovers the opinions held at different times by the Roman juriconsulti. And we shall thereby be assisted in the exposition of the origin of law, to which I now return.

St. Thomas Aquinas teaches us that, though the ultimate end of the Divine government of the world is exterior to the world, yet its imme-

* Donelli Comment. lib. 1, cap. 6, § 6.

^d Reiffenst. Jus Can. Univ. præm. parag. (chapter) 1, num. 11. And see Schmatzgrueber, Jus Eccles. Univ. tom. 1, præm. § 2, num. 46.

^e L. 5, ff. De Just. et Jur.

^f Cujac. Op. tom. 7, col. 16, 17. See the same idea in St. Thomas Aquin. De Regim. Princip. l. 1, cap. 12.

diate object is the order of things therein; from whence, indeed, he argues that there must be a Divine Providence. And he observes that inanimate things are governed without their exercising judgment, that is to say, by natural causes and effects; and brutes, though they have a species of judgment, are governed by natural instinct. But mankind have judgment and free-will, *liberum arbitrium*; and their actions, performed in the exercise thereof, are good when directed to the true end of man according to reason.^a

Pufendorf accordingly argues that the dignity of man, above other animals, requires that he should conform his actions to a certain rule, without which there would be no order or fitness in mankind.^b In fact, man would be an exception to the general principle laid down by St. Thomas as to the immediate end of the Divine government, for neither physical causes and effects nor instinct could suffice to regulate his actions.

This is evident from the mental and physical powers of doing evil, in which man surpasses all other animals—the number of his passions—the versatility of his mind—and the prodigious variety of character and disposition among men, which must cause horrible confusion unless brought to a certain harmony by laws: and that variety itself, duly regulated and controlled, becomes both beneficial and ornamental to human society.¹

These considerations show the necessity of laws as a portion of the Divine Polity, from whence we must infer that law, in its most extended sense, including both *lex* and *jus*, springs from the design and will of the Creator; and this Hooker has learnedly and splendidly shown with other things in the first book of his Ecclesiastical Polity.

But here we must take care not to fall into the errors of which Savigny writes as follows:—

“In order that free creatures placed together in the world may mutually assist and not injure each other in the development of their action, a line of demarcation must circumscribe limits within which the parallel development of individuals may find independence and security. The rule which fixes those limits and preserves that freedom of action is *right* or *law*.”

“Some writers endeavour to reach the idea of law by an inverse process, and place its fundamental basis in injustice. According to them injustice is the violation of freedom by an extraneous power, which is an obstacle to the development of man and the evil which requires a remedy; and, in their opinion, law is that remedy. Some

^a Div. Thomæ Summa, quest. ciii. art. 1, 2; quest. lxxiii. art. 1.

^b Pufend. Droit des Gens, l. 11, ch. 1, § 5.

¹ Pufend. *ibid.* §§ 6, 7.

make it derived from a reasonable agreement of individuals who sacrifice a part of their liberty to secure the rest. Others deduce it from an exterior force alone able to restrain the will of individuals naturally inclined to a state of war. These writers base their doctrines on a negation, as if disease ought to be the point of departure for studying the laws of life. According to them, *the State* is a coercive power which might be dispensed with if the will of all men were regulated by justice. But, in my opinion, *the State* would, under such a condition of things, shine with augmented grandeur and power."¹

Thus Hooker shows that the angels are in perfect obedience to the Divine Law,¹ and this St. Thomas Aquinas assumes throughout his disquisitions on their nature and attributes. The reasoning of Savigny is confirmed by Pufendorf's doctrine, that the weakness of the individual man with reference to his wants shows the necessity of law. No animal perhaps is so miserable as an insulated man in what has sometimes erroneously been called a state of nature—that is to say, a savage state. And even if we suppose a family living together in that state, their condition would evidently be more disadvantageous than that of animals, because their wants are greater, and their means of satisfying those wants quite insufficient;² and, indeed, this shows that such a condition is not the natural state of man, that is to say, it is not a state in conformity with his nature.

That nature evidently requires what is called *the social state*, because the nature of man, as a reasonable creature with an immortal soul, points it out as the state for which he was intended by his Creator.³ In this state alone can mankind satisfy all the wants which arise from the dignity of their nature. Now, unless we suppose the human race to consist of insulated individuals, which is absurd, men must be placed in various relations with each other; and those relations generate obligations regulated by law or right; and in the social state those relations, and the rules governing them, must be exceedingly complicated and numerous, including the duties of the man and the citizen. It is indeed impossible to conceive the social state fully accomplishing all the purposes for which it is intended, unless the actions of individuals are directed by rules of conduct which constitute law. Therefore,

¹ Savigny, *Traité de Droit Rom.* tom. 1, pp. 326. 327; liv. 2, ch. 1, § 52.

² Hooker, *Eccles. Polit.* b. 1, § 4.

³ Pufend. *Droit des Gens*, l. 11, c. 1, § 8. And see St. Thomas Aquinas, *Opusc. De Regimine Principum*, lib. 1, cap. 1.

⁴ See my *Readings at the Temple*, p. 7. St. Thomas Aquinas says, "Videtur autem ultimus finis esse multitudinis congregatæ, vivere secundum virtutem. Ad hoc enim homines congregantur ut simul bene vivant, quod consequi non posset unusquisque singulariter vivens. Bona autem vita est secundum virtutem. Virtuosa igitur vita est congregationis humanæ finis."—*De Regim. Princip.* lib. 1, cap. 14.



Hermogenianus, in the Pandects, describes civil society and the necessary transactions among men, as springing from *jus gentium*, by which he means natural law;⁶ which, in the words of Gajus—*naturalis ratio inter omnes homines constituit*.⁷ Law is not intended merely to restrain man from injustice and war, but to direct human society to the common welfare; and its origin and use are to be found in the very nature of man impressed upon him by his Creator. Law is not merely *delictorum coercitio*, but *commune præceptum, virorum prudentium consultum*.⁸

So Cardinal Contarini, in his work on the Constitution of Venice, says, that the commonwealth should be governed by something more excellent than the will of man, that its objects may be obtained, and therefore, by Divine council, the government of men is committed to laws.⁹

CHAPTER III.

THE ORIGIN AND FOUNDATION OF LAW.

SOME may perhaps think, that instead of commencing with the foundations of legal philosophy, we should have proceeded in these Commentaries at once to the practical part of Public Law, giving a summary of rules and authorities applicable to different events and affairs, with reasons and consequences. The course which we have adopted requires some explanation.

Even in mathematics, axioms are laid down as first principles from whence truths are demonstrated. But the use of first principles is as important in the study of moral sciences, such as ethics and law, as in mathematics. Burke observes, that the excellence of mathematics is to have but one thing before you, but he forms the best judgment in all moral disquisitions who has the greatest number and variety of considerations in one view before him, and can take them in with the best possible consideration of the mesne results of all.^a It follows that those sciences are necessarily of a very complicated nature, and every proposition that is not a primary truth depends on reasoning

⁶ L. 5, ff. De Just. et Jure.

⁷ L. 9, ibi.

⁸ L. 1, ff. De Legibus.

⁹ Della Repub. e Magistr. di Venetia del Card. Contarini, lib. 1, pp. 22, 23.

^a Burke, Speech in the House of Commons, May 8th, 1780.

which connects it with a multitude of rules and doctrines derived from fundamental principles which are the basis of the entire science: and, indeed, the moral sciences are so intimately connected together that it is often difficult to show their various points of contact and separation. Law must be considered as one single science, though it has many different branches, because they are all connected together, and all depend directly or indirectly on certain principles from whence the vast multiplicity of laws, rules and doctrines are deduced.

It follows from these characteristics of moral science, and law especially, that what is commonly called the practical ought to be inseparable from the theoretical part; and it is difficult to obtain a masterly knowledge of any considerable branch of law, or to arrive at a tolerable proficiency in general jurisprudence, without a careful investigation of fundamental principles and doctrines which are the *primordia* of law.

So the Chancellor D'Aguesseau advises his son to go to the very first principles of law, and examine the grounds of natural law. "You perhaps thought," says the Chancellor, "that when you finished the study of philosophy you had taken leave of metaphysical investigations. But you will return to them when you examine the origin of natural law and its consequences, and all those matters which may be called the metaphysics of jurisprudence. I should not, however, advise you to devote your time to that subject, if its study were calculated more to adorn the mind than to form it. But you will find that almost all the principles of the most venerable laws, that is to say those which are universal and immutable, depend thereon, as so many natural consequences derived from that original justice of which God is the source, and the first notions whereof He has engraven in our very existence. You must, therefore, make the metaphysics of law a study preliminary to every other study of jurisprudence. And I advise you for that purpose to read the first book of Cicero de Legibus, where he examines the first principles of all laws."^b And then the Chancellor particularly recommends the careful and profound study of Domat's Treatise on Laws.

This is the opinion, not of a professor or a mere writer on law, but of a great judge and statesman actually engaged in the administration of justice, who knew by experience the importance of combining practical with theoretical science. And Savigny, in his History of the Roman Law,^c shows that this combination caused the success of the first school of civilians—the Glossators. He observes that the distinction between legal theory and practice may be traced to those

^b D'Aguesseau, Œuvres, tom. i, pp. 270, 271, Prem. Instruct.

^c Savigny, Hist. du Droit Rom. tom. 3, ch. xli.

times, and that the life or death of both depends on the spirit governing the partition of those two branches of science. Considered in a purely theoretical point of view the glossators might have derived nothing from their labours beyond exercise of the mind, but the active part which they took in judicial and political affairs saved them from that danger. When in the middle of the thirteenth century the scientific spirit of legal studies was extinguished, the progress of science became impossible, and it fell into a sterile condition. This shows how important the science of law must be to its practice.

To every branch of public law these observations apply with very great force. Public is of a more generalizing nature than private law, because it regards wider interests and rights, including what relates to the common welfare of the state and of society; and these matters flow from certain principles to which the social state and human government, and the various institutions and laws arising therefrom, may be traced. The reasons of all these things cannot be clearly understood, unless the fundamental doctrines from whence they directly or indirectly spring are first studied.

Therefore the doctrines regarding the origin and nature of law are material to the science of Public Law, and indeed they are the very root of all jurisprudence. They will give us a broad view of legal science, without which its details cannot be so completely or easily mastered.

We have seen, as St. Thomas Aquinas teaches, that the eternal law directs all things towards their proper end. And thus Domat lays it down, that to discover the first principles of laws, two primary truths should be laid down; first, that the laws of man, that is to say, those whereby he is governed, are the rules of his conduct; and, secondly, that his conduct, directed by those rules, consists of the steps which he takes towards the end for which he was created.⁴

And here we find a connection between law and theology; because, as man has an immortal intelligent soul, his end cannot have reference solely to his existence here, but must relate to his moral nature and immortality.

Domat, whose words derive additional authority from the fact that they were written under the advice of the Chancellor D'Aguesseau, continues thus: "Among the objects which offer themselves to man in the whole world, even including his fellow creatures, none of them is worthy to be his end. With regard to himself, so far will he be from finding his happiness there, that he will see nothing but the seeds of misery and death. And round about him, if we go over

⁴ Domat, *Traité des Loix*, chap. 1, § 3.

the whole creation, we shall find nothing there that is fit to be given as an end either to his mind or to his heart. And the things which we see are so far from being our end, that we are theirs, since they are made for us.* And we see plainly that everything there is so little worthy both of our mind and of our heart, that as for the mind, God has hidden from it the knowledge even of creatures beyond what regards the ways of using them. And the sciences which apply to the knowledge of their nature, discover nothing further in them than what may be of use to us, and grow darker and less intelligible the more they attempt to penetrate into that which is not required for our use.^f And as for the heart, the whole world is not capable of filling it, and it was never able to make any one happy. In short we must learn from Him who has made man, that it is He alone who is both the beginning and the end of man,^g and God only can fill the infinite vacuity of that mind which he has made for Himself.”

“It is therefore for God himself that God has made man. It is that he may know Him that He has given him understanding. That he may love God, He has given him a will. And it is by the ties of this knowledge and of this love that He would have men unite themselves to Him, that they may in Him find their true life and their only happiness.”^h

We find the same doctrine briefly stated by St. Thomas Aquinas in his treatise *De Regimine Principum*, where he says, that all things are ordained to a certain end; and so man has an end to which all his life and all his actions are directed, because he is an intelligent agent, and therefore capable of working out his own end.ⁱ

From this argument, Domat deduces the first Law of Man, which is laid down in the Gospel as the first and great commandment, that is to say, *the Love of God*.^j

This, he says, is the first law, which is the foundation and first principle of all others. For this law, which commands men to search after and to love the Sovereign Good, being common to all mankind, it implies a second law which obliges them to unity among themselves, and to the love of one another. But, he observes, there is no law commanding man to love himself, because no one can better love himself than by keeping the first law and regulating his life thereby.

* Deut. iv. 19.

^f Eccles. iii. 22.

^g Rev. xxii.; Isai. xli. 4.

^h Prov. xvi. 4; Isai. xliii. 7; Deut. xxvi. 19.

ⁱ Div. Thom. Aquin. Opusc. De Regimine Principum, lib. 1, cap. 1.

^j Domat, Tr. des Loix, cap. 1, § 6.

"It is by the spirit of these two laws," continues the learned civilian, "that God designing to unite mankind in the possession of their common end, bound them together in the use of the means conducting them thereto, and then has made this union, which is to be their happiness, to depend on their use of the first law which is to form their society." That is to say, their union in the love of God is the source and principle of their union among themselves.

And in order to unite them in this society or social state, God has made it essential to their nature. And as we see in the nature of man his destination to the Sovereign Good, we also discover in it his destination to society, and the several ties which on all sides engage him in it; and we see that these ties, which are consequences of the destination of man to the exercise of the two primary laws, are at the same time the foundation of the particular rules of all his duties, and the fountain of all laws.¹

Domat notices the objection, that society, though it ought to be grounded on those two primary laws, does nevertheless subsist, notwithstanding that their spirit has apparently little influence over it. He very judiciously answers, that though men have violated these fundamental laws, and though society be in a state different from that which ought to be raised on them, yet it is nevertheless true that these Divine Laws, which are essential to the nature of man, remain immutable and have never ceased to be obligatory. And it is likewise certain, as will be shown hereafter, that all the laws which govern society, even in its actual condition, are consequences of the two primary laws. And therefore it was necessary to establish these first principles.

There is a remarkable agreement between the two primary laws laid down by Domat, and the three *præcepta* of Ulpian, which we must now examine. Ulpian thus lays down three primary laws: *Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.*^m Savigny, commenting on this law, says, that *honeste vivere* is the maintenance of the moral rectitude of the individual,—*neminem lædere* is the observance due to other men, and *suum cuique tribuere* is the recognition of the rights vested in others. These, he observes, are not properly rules of law, but principles of morals proper to found rules of law. Thus the third precept, *suum cuique tribuere*, is evidently the moral law of justice. And many of the most important laws are derived from the second precept, *neminem lædere*. And the first precept, *honeste vivere*, is also the source of more than one rule of

¹ Domat, ubi sup. § 8. And see Zallinger, Instit. Jur. Natur. et Eccles. l. 1, c. 20, § 22.

^m L. 10, § 1, ff. De Just. et Jur.

law, and is therefore a real *juris præceptum* in the sense understood by Ulpian. From it flow the laws protecting morals, such as those whereby contracts are rendered void by an immoral consideration. With the same principle are also connected the numerous rules of law requiring sincerity and honesty in contracts, and also the extensive influence exercised by the law regarding fraud over matters of private law. Thus the three *præcepta* of Ulpian are not rules of law, but general principles calculated to form categories of rules of law.

"If," says Savigny, "the three *præcepta* are to be classified according to their essence, the first must be placed at the head of them, as the most profound, and as containing the germ of the two others. The second has an exterior character still more visible in the third. Thus, the two latter may be obeyed without reference to the morality of the agent. But if they be considered with reference to their legal importance, the result is opposite. The third is the most fertile source of rules,—then comes the second, and lastly the first. This arises from the nature of law, which is required to regulate the outward relations of common life."^a

Now the first precept, *honeste vivere*, bears an analogy to the first law laid down by Domat, the *love of God*, which includes specially all those obligations which do not directly regard other men. That precept may be considered as the pagan version of the Christian doctrine, which makes duty to God the root of all law. But, as it does not directly regard obligations towards other men, it produces fewer legal results than the other two. They are included in Domat's second primary law, which comprises man's duty to his neighbour. But, as Savigny judiciously observes, the first precept contains the germ of the other two; and from the first law of Domat, the obligatory force of the others and of all laws is derived. This is well shown in a celebrated letter of Barbeyrac to Leibnitz, and, indeed, it appears from the description of natural law given by Grotius, who says, that it consists of certain principles of right reason, which enable us to know that a certain action is right or wrong according to its congruity or incongruity with the reasonable and social nature of man, and consequently that God, who is the author of nature, commands or forbids that action.* Grotius thus reduces the obligation of natural law to the will of and duty to God.

Barbeyrac argues thus:—Either the obligatory force of the rules of justice among men is absolutely independent of the divinity and founded solely on the nature of things,—like principles of arithmetic

^a Savigny, *Traité du Droit Rom.* tom. 1, p. 402—4.

* Grot. *Droit de la G.* liv. 1, ch. 1, § 10.

and geometry,—or it is not founded on the nature of things.^p Now the nature of things cannot by itself impose on us an obligation properly so called. If there be a given relation of equality and proportion, of fitness or unfitness in the nature of things, that only obliges us to recognise such relation. Something more is requisite to restrain our freedom, to oblige us to regulate our actions in a certain way. Reason considered by itself, and independently of the Creator who has given it to us, cannot place us under the moral necessity of following those principles, though it may approve of them as founded on the nature of things. For our passions oppose those abstract principles, by offering to us objects which, if less in conformity with fitness, are more attractive to our feelings; and apart from an exterior power, a being above us, there is nothing obliging us to resist them. Reason, it will be argued, shows us clearly that by observing the rules arising from fitness founded on the nature of things, we shall act in a manner more conformable to our interests than we should do by being guided by our passions. But the question is one not of utility, but of duty and obligation. No doubt our interests require, upon the whole, that we should follow the dictates of reason. But is not every one at liberty to renounce an advantage, provided there be nothing to prevent him from doing so? Thus by not conforming to fitness founded on the nature of things, a man would only act imprudently, and imprudence is not here opposed to any duty, for we have to discover whether there be any duty.

But it is moreover very material to observe, that our reason, considered apart from all dependence on its Creator, from whom we hold it, is in substance nothing but ourselves. Now no one can impose upon himself an obligation towards himself, obliging him to act or not to act in a particular manner. Hence the common maxim of law—*debitum et creditum non possunt concurrere in eadem persona*. And in the civil law a debt is extinguished by confusion when this concurrence takes place. *Nemo potest sibi debere*; and therefore the concurrence of right and obligation in the same person extinguishes both.^q The same legal doctrine may be seen in Littleton, sects. 222, 223, 224, &c., where he treats of the extinction of rents and services. Its reason is that no necessity to do or not to do any act can exist, if it be subject to the will of persons affected by such supposed necessity. Now Justinian correctly defines an obligation as *vinculum juris quo neces-*

^p Jugement d'un Anonyme, etc., printed with Pufendorf's *Devoir de l'Homme et du Cit.*, translated by Barbeyrac. And see Grot. *Droit de la Guerre*, l. 1, ch. 1, § 10, note 4, by Barbeyrac: and Barbeyrac's Pref. to Pufendorf, *Dr. des Gens*, § 5.

^q Voet. ad Pand. lib. 46, tit. 3, § 18; Bowyer, *Com. on the Modern Civil Law*, 260.

sitate adstringimur.' And if the person on whom that necessity is imposed be the imponent, he will be able to relieve himself from it whenever he pleases.

Barbeyrac concludes that even the maxims of reason are not by themselves obligatory, however agreeable they may be to the nature of things, until we discover the author of the existence and nature of all things. The question remains to be considered, whence comes obligation? Is it from the will of God, or from any other thing in Him?

It is, in the first place, impossible to form a just idea of God without recognizing his right to limit at pleasure the faculties which He has given to us. And it is clearly God's will that men should follow the light of reason, as that which is most excellent in them, and can lead them to their natural destination. And in His will we find all that is requisite to constitute an obligation, since it is the will of the Master of all mankind, and a will ever in accordance with the perception of the divine nature. Why then seek any other principle than this, which is comprehensible to all men, and so naturally arises from the relation between the Creator and the creature?

Choose any other attribute of the Divinity and view it apart from His will. You will not find in it a more solid foundation for *obligations* than in the nature of things. If, for example, it were possible to conceive, after the fashion of the Epicureans, a God indifferent whether men act or no according to the nature of things and their own nature, the contemplation of such a Divinity with all infinite perfections would only furnish an example which does not by itself produce a necessity to imitate it. And if it be not the will of God that all His rational creatures should follow the rules of justice with each other, how can we conceive the existence of divine justice? Can we believe the Creator to be just, if it be indifferent to Him whether men are so, and if He do not impose on them the obligation of observing justice.

And the divine will cannot be made a mere accessory to an already existing independent obligation. If this were so, the supreme authority of God would be restricted to things in themselves indifferent. And thus no more force would be attributed to the will of God with regard to the rules of justice than to that of a prince, a father, a master, or any other human superior, who wishes his dependents to be honest men. Moreover, we commonly find the practice of duty and virtue described in Holy Writ as doing the will of God.*

With these arguments, Barbeyrac very conclusively establishes the origin and nature of the obligatory force of natural law, and shows

* Instit. lib. 3, tit. 14, pr.

* Matt. v. 48; Luke, vi. 36.

how law derives its obligation—the *vinculum juris*—from the primary fundamental law of the Gospel prescribing our duty to God.

We come now to a part of the subject in which the difficulty arises that our language does not contain any word answering to the Latin word *jus*, as contradistinguished from *lex*. That distinction is, however, quite necessary for comprehending the civilians and jurists.

St. Thomas Aquinas says, *jus non est lex, sed potius id quod lege præscribitur, seu mensuratur*. Law—*lex*—is a rule of conduct prescribed by the will of a superior, whereby he imposes on those who are subject to him, the obligation of acting in a particular way, which he prescribes to them.¹ Thus *lex* is the law looked upon as a rule prescribed, that is to say, extrinsically, and *jus* is the law considered as a principle, and intrinsically, with reference to what it prescribes, and what particular obligations it creates. And therefore the word *jus* is also used (as Grotius shows) to signify a moral quality belonging to a person, by virtue of which he may lawfully have or do certain things, that is to say, a right.²

We must now consider the foundations of law, taken in the sense of the word *jus*.

Grotius lays it down that natural law consists in certain principles of right reason, which teach us that an action is morally right or wrong, according to its necessary conformity with, or repugnance to, a rational and social nature, and that consequently God, who is the author of nature, commands or forbids that action.³

We have to investigate the first part of this definition, the principle on which the distinction between those two classes of actions rests, that is to say *jus*—the law viewed intrinsically, apart from the command of a superior, whereby it is made obligatory.

Gajus agrees with Grotius in holding that natural law consists of principles of reason.⁴ He lays it down in a very celebrated law in the Pandects, that all nations, governed by laws and morals, make use partly of their own peculiar laws, and partly of laws common to all men. For, he continues, the law which each nation constitutes for itself is proper to that city, and is called *jus civile*. But that which natural reason has constituted among all men is observed everywhere, and is called *jus gentium*, because all nations use it. We shall see, hereafter, the relation between civil and natural law, when we come to the distinction between arbitrary and immutable laws.

Grotius cites a passage of Carneades and of Horace, calling utility,

¹ Pufendorf, *Devoir de l'Homme et du Cit.* l. 1, ch. 11, § 11, not. Barbeyrac.

² Grot. *Dr. de la G.* l. 1, ch. 1, § 4.

³ *Ibid.* § 10.

⁴ *L.* 9, ff. *De Just. et Jur.*

as it were, the mother of justice and equity. And he observes, that this is not strictly correct, for human nature itself is the mother of natural law, because it would lead us to seek intercourse with our fellow creatures, even if we were in want of nothing. And even civil or municipal law draws its obligatory force from natural law, because the duty of obeying municipal laws is essential to the existence of civil society, which is an institution prescribed by natural law.

The truth is (as Grotius observes), that utility accompanies natural law, because the Author of nature has ordained that each individual shall be weak by himself, and shall be in need of many things, in order that we may be induced to maintain the social state. And so the principle of utility has given occasion to civil laws; for the association of men in civil society, and their submission to a common authority, were originally commenced with a view to some advantage.

Grotius accordingly thus distinguishes between the sciences of politics and law. "I have abstained from touching what belongs to another subject, i. e. giving the rules of what is expedient, for that belongs to a peculiar science, namely, politics. Aristotle correctly treats that subject by itself, unmixed with any other, instead of which Bodinus often confounds it with the science of law."^a And Barbeyrac observes, on this passage, that though sound policy sanctions nothing but what is just, yet justice and utility are two separate and distinct things, even in politics. Thus, to undertake war legally, there must be a just cause of war. But however just the cause, it may be highly injurious to engage in war, and to do so would be an error in politics.

This doctrine is not inconsistent with the maxim of Cicero. *Eadem utilitatisque honestatis est regula,*^b for his real meaning is, that nothing is truly and solidly useful except what is just. And so far from sanctioning the views of those who hold utility to be the test of justice, he maintains that justice and morality are the real test of utility. Thus he establishes one rule, namely, that of right and wrong, so far at least, that nothing is to be done on the plea of utility contrary to the dictates of justice and morality.

Cujacius, in commenting on the law, *Omnes populi,*^c which we have just cited, says, that Epicurus did not, like Gajus, deduce the law common to all men from nature, but drew it from the principle of utility or advantage. And he adds, "We follow the Stoics, who derive that law from nature, and deduce the law proper to each city, that is to say, civil or municipal law, from common utility; that is to say, what is useful and advantageous to the community."

^a Grot. Dr. de la G. Disc. Prelim. § 59.

^b Cic. De Offic. lib. iii. c. 18.

^c Cujac. Op. tom. 7, col. 48; Donelli Comment. lib. 1, cap. 6, § 10.

Thus Donellus teaches, that *naturalis ratio*, of which Gajus speaks, is the Law of God written, as St. Paul says, in our hearts;^c and that this is evident from the mere fact that all men bear witness to this law; for when they offend against it themselves their conscience accuses them, and they always condemn others so offending and hold them deserving punishment.^d It would indeed be absurd to say, that whereas the Creator gave us reason and a sense of right and wrong, requiring of us the performance of certain duties towards Himself and to our fellow men, yet we are unable to perceive those duties by the use of our reason. Thus we know that certain acts are wrong, not merely because they are contrary to the rules of utility, but because they are violations of *naturalis ratio*, that Law of God written, as St. Paul says, in our hearts.

All these legal doctrines will become clearer when we pursue our examination of Domat, who looks upon them from a somewhat different point of view to that of Grotius and Pufendorf.

We have examined them hitherto principally with reference to certain questions which have obtained much celebrity among the learned. And in doing so we have noticed several famous laws in the Pandects, on which much has been written.

In the next chapter, the systematic explanation of the way in which different classes of laws are deduced from the two primary laws will be continued.

CHAPTER IV.

THE ORIGIN AND FOUNDATION OF LAW.—PRIMARY AND SECONDARY NATURAL LAW.

WE have shown the origin of the first principles of law from the two prime truths, that the laws of man are the rules of his conduct, and that his conduct is nothing else but the steps which he takes towards his end. And then, after demonstrating the true end of man by taking a view of his nature, we have laid down, under the guidance of Domat and the Chancellor D'Aguesseau, the two primary laws, taken

^c Rom. ii. 14, 15.

^d Donelli Comment. lib. 1, cap. 7, § 2.

from the Gospel, prescribing the duty of man to God and to his neighbour, from whence hang all laws.*

This system agrees with divers texts in the title of the Pandects *De justitia et jure*, and with the doctrines of commentators and jurists, who have nevertheless looked on the origin of law from a somewhat different point of view. So we have seen that Ulpian, in the tenth law of the title just referred to, lays down three precepts, which bear an analogy to Domat's two primary laws. And Grotius and Pufendorf both confirm the doctrines of Domat, though they do not trace the origin of law quite so high as he does, because they do not derive it from primary laws springing immediately out of the will of God manifested in the Creation, and written, as St. Paul says, in the heart of man. In St. Thomas Aquinas we find a more direct confirmation of Domat's principle, since he distinctly teaches, that all things are ordained to an end, and that so man has an end to which his whole life and all his acts are directed, because he is an intelligent agent, to whom it is proper to work out his end. And then St. Thomas establishes the social nature and destination of man, calling him *animal sociale et politicum*. And he shows the true scope of that nature and destination to be something beyond temporal utility and convenience.¹ Now the laws of mankind, whereby they are under Divine Providence governed, are evidently the rule of their conduct with reference to their end or ultimate destination. In this sense we may accept the definition of Ulpian—*Jurisprudentia est divinarum atque humanarum rerum notitia; justique atque injusti scientia*.² Thus Cujacius, commenting on this celebrated text, shows it to mean, that jurisprudence is that wisdom, which by the investigation of things both human and divine determines the rules of justice.³

It is true that Voet interprets this text, as referring in part to the public law of the Romans; which, as Ulpian says, regards ecclesiastical as well as civil matters. *Jus publicum in sacerdotibus, in sacris, in magistratibus consistit*.⁴ But it must also be understood as teaching that jurisprudence, even temporal, is derived not only from human nature and human affairs by themselves, but from the relation which they bear to things divine. And we have accordingly shown that the obligatory force of natural law springs from the Divine Will. And here we see the connexion between jurisprudence and theology, and the impossibility of entirely separating those sciences—two truths

* Domat, Traité des Loix, § 3.

¹ Div. Thom. Aquin. De Regim. Princip. l. 1, cc. 1, 14.

² L. 10, § 2, De Just. et Jur.

³ Cujac. Op. tom. 7, col. 54.

⁴ Voet ad Pand. lib. 1, tit. 1, § 4, 7; l. 1, § 2, ff. De Just. et Jur.

on which the soundest jurists, but especially the canonists, strongly insist.

The canon law furnishes a remarkable example of the principle referring law to an ultimate end, which is its essential and fundamental rule. The canon law is thus defined: *Est igitur jus canonicum quod civium actiones ad finem aeternæ beatitudinis dirigit.*^a Now the canon law, which is the body of rules provided for the government and administration of the Catholic Church, has two objects, an immediate object, and an ultimate object. The former is the due performance of Divine Worship and the fulfilment of the other exterior functions and duties belonging to the Church. The latter is that described in the passage just cited, namely, the end of the Church itself. And this end or ultimate purpose of the canon law only differs from that whence Domat deduces the two primary laws, inasmuch as it is more definite and specific. And the canon as well as the temporal law hangs on those two primary fundamental laws.

So do we see the beautiful harmony of the parts of universal jurisprudence, and the way in which they conjoin together for the regulation of human affairs. This indeed is no cause for astonishment, because man is brought into the world for one end or purpose, as Domat shows; and since laws are those rules of conduct whereby he is directed to that end, they must (though appertaining to different parts or aspects of human life) partake of the unity of the end itself. And we cannot conceive the scheme of Divine government apart from unity of purpose, without forming a notion inconsistent with Divine perfection, which seems to imply consistency and harmony, generated by that unity. This idea becomes a very important subject of meditation if we take a comprehensive view of universal jurisprudence as the aggregate of all those rules and principles whereby mankind are externally governed under Divine Providence. When we come to examine the classification of laws, this view of universal jurisprudence will be clearer. It is sufficient to say here that every law, whatever it may be, either bears or is supposed and ought to bear some relation, however indirect, to the fulfilment of the purposes of human society, and to the ultimate end of that society. The reasons on which different kinds of laws are founded are various.¹ But though municipal laws may be more or less adapted to the end for which they ought to be framed; yet such is the nature which the Creator has given to man, that all municipal laws not inconsistent with that nature must be consequences, direct or indirect, of the two primary laws. And so Suarez

^a Lancelot, *Instit. Jur. Can.* lib. 1, tit. 1, § 1; Reiffenstuel, *Jus Canon.* Univ. proem. § iii. num. 36; Barbosa, *Collectanea Doctorum*, tom. 5, p. 16, in part 1 *Decreti—Distinc.* iii. c. 1.

¹ See my Readings at the Middle Temple, Reading X.

lays it down that all human laws are originally derived, in some way or other, from divine law, and he cites this fine passage of St. Augustine: *Conditor legum temporalium, si vir bonus est et sapiens, legem æternam consulit, ut secundum ejus immutabiles regulas, quid sit pro tempore jubendum vetandumque discernat.*^m

It is on this principle that simply human laws are in general binding on men's consciences, as Blackstone says. We cannot break a human law without violating a part of the secondary natural law, which requires us to obey lawful authority, for the maintenance of human society and the attainment of its ultimate objects. And thus we find the duty of obedience to the civil magistrate repeatedly laid down in Holy Writ. This obedience is, no doubt, a general duty, though it has exceptions in certain extreme cases, where the civil power commands things repugnant to the two primary laws, or forbids acts commanded by divine law.

We have now to consider the plan of civil society drawn by Domat and sanctioned by the high authority of the Chancellor d'Aguesseau.ⁿ In the first place civil society is founded on the two primary laws. We have seen in St. Thomas Aquinas that the social state is designed to enable man to fulfil his end, that is to say, the purpose of his creation, more completely than he could do living in a solitary condition. And in order to unite men in society, God has made it essential to their nature.

"As we see," says Domat, "in the nature of man, his destination to the Sovereign Good, so we shall also discover several ties which on all sides bind him in it; and these ties, which are consequences of the destination of man to the exercise of the two first laws, are at the same time the foundation of the particular rules of his duties, and the foundation of all laws."

"But before we proceed any further to show the connection which links all the laws with the two first, it is necessary to obviate the reflection, that though society ought to be founded on the two first laws, it does nevertheless subsist though their spirit has but little influence on it, so that it seems to maintain itself by other principles. However, although men have violated these fundamental laws, and although society be in a state strangely different from that which ought to be raised on these foundations and cemented by this union, it is still true that these divine laws, which are essential to the nature of man, remain immutable and never cease to be binding on mankind. And it is likewise certain, as will hereafter appear, that all laws which govern

^m Suarez, *De Leg.* lib. 1, c. 3, § 17; Div. August. *De Vera Relig.* c. 31; Reiffenstuel, *Jus Can. Univ. præm.* § 13.

ⁿ D'Aguesseau, *Œuvres*, tom. 1, p. 273.

society, even in its present condition, are consequences of these first laws. Thus it was necessary to establish these first principles; and besides, it is not possible to comprehend rightly the manner in which we see society subsist at present without knowing the natural state in which it ought to be; and considering in it the union which the divisions of mankind have broken, and the order which they have disturbed."

"For the purpose therefore of judging of the spirit and use of the laws which maintain society in its present condition, it is necessary to draw a plan of this society on the foundation of the two primary laws, to the intent that we may discover therein the order of all the other laws, and the connection which they have with the two first. And then we shall see what method God has taken to make society subsist in the state in which it is, and among those persons who, not governing themselves in it according to the spirit of the fundamental laws, ruin the foundations which He has laid for it."*

This passage points out very well the province of jurisprudence to determine the principles from whence laws are derived, and the way in which society is founded thereon, though different causes disturb the effect of the two primary laws, and thereby alter in divers ways the plan which would otherwise result from them. One great object of government is to meet and counteract those causes, and this shows the importance of studying the philosophical part of jurisprudence, which teaches the true system of laws with reference to the fulfilment of God's ordinances and the constitution of human society. Moreover, though those true principles are often disregarded and violated, yet in the main all society, and the whole system on which the world is governed, are founded on them, and can be maintained only by their observance, so that any violation of them necessarily produces inconvenience more or less prejudicial to the body politic. So St. Augustine, in his treatise *De Civitate Dei*,^p says:—*ubi non est vera justitia, juris consensu sociatus cælus hominum non potest esse*. And he explains that a commonwealth—(*Respublica*)—cannot be without justice, because the very idea of a commonwealth implies an association of men for the common advantage, which cannot exist without law and justice. Thus Cicero says, *Non modo falsum esse istud sine injuriâ non posse, sed hoc verissimum,—sine summâ justitiâ rempublicam regi non posse*.

The relation which the state of man in this life bears to the first of the two primary laws is simple. He is not in possession of the sovereign good, but placed here to attain it. And his understanding and his free will enable him to pursue that object which is the end of his

* Domat, *Loix Civiles*; *Traité des Loix*, ch. 1, § 8.

^p Div. August. de Civit. Dei, lib. 19, cap. 21.

creation. And for this purpose his conduct must be in conformity with the first law commanding the love of God, from whence the obligation of all other laws is derived. We need not enter here into any explanation of the truths of religion. It suffices (as Domat observes) to assume those truths, for the purpose of giving an idea of the plan of society, because we are considering law as a rule of men's outward actions. That rule is not however sufficient in itself for the government of mankind. This is so not only because the government of men's minds, which are the most excellent part of them, is necessary even for the purpose of regulating their outward acts, but also because, as I have already shown, man must be considered with reference to the immortality of his soul even in regard to human government. If this be neglected, an imperfect view will be taken of the scheme whereby Divine Providence intended that the world should be governed, and the result must be an imperfect plan of social polity.

The truths of religion have an immediate connection with the first law, which we are considering, and spring from the same source as all law. But religion regards the interior forum primarily, and looks on men in their relation to a future existence; whereas the province of law is the regulation of outward acts in this world, since law is a rule of conduct, and not of the interior movements of the soul. Though Ecclesiastical Law regards men as members of the Universal Church, or in their relation to it, yet the same principle applies that it is a rule of external conduct.⁶ Thus the common maxim declares—*Ecclesia non judicat de occultis*. And the canonists show that the canon law is a rule of civil conduct, that is, a rule to direct the actions or conduct of the citizens of that commonwealth—(*civitas*)—of which it is the law, namely, the Church.⁷

It follows, therefore, that we are here to regard the first law in its relation to the rules of conduct, that is to say, the laws of the outward acts of men, whereof it is the source, though it is also a fundamental principle of religion. There is no difficulty in seeing why law and religion have that first principle in common. It is because they have a common object, which is the end for which man was created.

We come now to the second primary law. The various reasons which have already been explained, showing man's destination for the social state, lead him to observe that second law. That state is called by the soundest jurists the natural state of man, because it is the only condition in conformity with his nature, having regard to his destination here on earth. And Domat very judiciously observes, that, "As

⁶ Suarez, *De Leg.* lib. 4, cap. 12, 13; *Decret. Gratian. Tract. De Pœnit.* cc. 14, 31; *Can. et Decret. Concil. Trident. sess. xxiv. div. inform. matrim.* c. 1.

⁷ Lancelot, *Instit. Jur. Can.* l. 1, tit. 1, § 1; Reiffenstuel, *Jus Can. præm.* § 3.

to the second law, God has so arranged men among themselves and adapted the creation to mankind, that the same objects which ought to excite in them the love of the Sovereign Good, engage them likewise to society and a mutual love of one another. For we see nothing," he adds, "and we know nothing either within or without man, but what points out his destination to society."

"Thus, exteriorly to man—the heavens, the stars, the light, the air, are objects which present themselves to mankind as benefits common to them all, and of which every person has the entire use. And the things which the earth and the waters bear or bring forth are for the use of man, but in such wise that no one of them passes to our use but by the labour of several persons, and thus renders men necessary one to the other, and forms among them different unions or connections for the purposes of agriculture, commerce, arts, sciences, and all the other communications which the various wants of life may require."

This remarkable passage of Domat bears an analogy to the celebrated law of Hermogenianus in the Pandects, where he says that from the *jus gentium* (which must be understood to mean natural law) are derived the separation of mankind into nations, the institution of property, dealings and commerce among men, and a variety of other things and obligations except those which were introduced by civil law.³ All these things arise from the social nature of man, and are governed by rules deduced from the second of the two primary laws.

"Thus," continues Domat, "within man we see that God has formed him by an incomprehensible conjunction of spirit and matter; and has created him by the union of a soul and a body, in order to render that conjoined soul and body and that divine structure of senses and members, the instrument of two uses essential to society.

"The first of these uses is to bind the minds and hearts of men together by the communication of their thoughts and sentiments. The second use of the body is that of applying men to all the different works which God has made necessary for their wants, because it is for work that God has given us senses and members. And though it be true that the labours which occupy men are a punishment inflicted on them, yet it is certain that man is so naturally destined to work, that it was enjoined to him even in his state of innocence.⁴ But one of the differences between the labours of that first state of man and those of the present consists in this,—that the labour of man in his state of innocence was an agreeable occupation to him, without pain, without disgust and without weariness; whereas our labour is im-

³ L. 5, ff. De Just. et Jur.

⁴ Gen. ii. 15.

posed on us by way of penalty.* Thus the law enjoining labour is essential both to the nature of man and to the condition to which his fall has reduced him; and this law is also a natural consequence of the two primary laws. By placing man in society they engage him to labour, which is a bond thereof, and appoint to each his particular work, distinguishing by its diversity the different employments and conditions which should compose society.

"It is thus that God having destined mankind for society has constituted the ties which engage him to it; and as the general ties which He makes among all men by their nature and by their destination to the same end, under the same laws, are common to the whole of mankind, and they do not constitute in each individual any singular relation which connects him more with one person than with others, He adds to these general and common ties, other ties and engagements of divers sorts. By these He unites men more closely among themselves, and determines every one to exercise towards some particular persons the duties which no one can exercise towards all mankind in general. So that these engagements are to each as it were particular laws, defining what the second law requires of him, and which consequently regulate his duties. For the duties of men towards each other are the effects of that which is prescribed to them by the second law, according to the engagements under which every man happens to be.

"These particular engagements are of two sorts. The first is of those which are constituted by the natural ties of marriage between man and woman, and of birth between parents and children; and this kind of engagements comprehends the engagements or obligations of relationships and alliances which are consequences of marriage and birth.

"The second kind of engagements comprehends all the other sorts of engagements, which draw all manner of persons nearer to one another. They are constituted differently, either in the several communications of work, or labour or industry, and different sorts of offices, services, and other aids which pass among men, or in the relations regarding the use of things. Herein are comprehended all the divers uses of arts, employments and professions of all kinds, and all that can connect men together according to the several wants of life, either by gratuitous or by commercial communication.

"It is by all these engagements of two classes that God forms the order of the society of mankind, to link them together in the exercise of the second law; and as He marks in such engagement that which is prescribed therein, so we discover in the characters of the various

* Gen. iii. 19.

sorts of engagements, the foundations of the different rules of that which justice and equity require of each person according to the conjunctures in which his particular engagements place him."

This masterly classification of the engagements on which human society is constructed, requires some further investigation before we proceed with the famous plan drawn by Domat and the Chancellor d'Aguesseau.

Zallinger deduces natural law, like Domat, from the two primary laws or precepts of the Gospel—*Diliges Dominum Deum tuum ex toto corde tuo, et in totâ animâ tuâ, et in totâ mente tuâ; hoc est maximum et primum mandatum. Secundum autem simile est huic, diliges proximum tuum sicut teipsum.** He observes, that not only external acts, but even the internal movements of the will, are subject to natural laws.* This is the reason why intention is material to the legal effect of human actions; and hence we see the connexion between natural jurisprudence and ethics. But the science of ethics is more extensive than that of natural jurisprudence, because it comprehends the whole range of morality, and treats of all virtues and vices, and the principles by which moral men are governed; whereas natural law has regard chiefly to duties and rights considered as a rule of external conduct for man, regarded as a social responsible being bound to procure, as far as in him lies, the welfare of society.

This explains how it is that Domat deduces from the two primary laws which are addressed to the soul of man—and intended, in the first instance, to govern his mind—the ties or engagements on which human society is built, and to which men are led by the nature of things.

Domat's classification of those engagements will be further explained and rendered more useful by examining the distinction between absolute and conditional or hypothetical rights and obligations, whereby natural law is divided into two parts or branches—primary and secondary natural law. This distinction is a most important point in the science of jurisprudence, without which the works of the civilians and jurists cannot be understood.

The civilians hold that there is a sort of *jus gentium* innate in man from the very beginning, and another sort engendered subsequently by human wants. The former they call primary, or primæval, and the latter secondary.[†]

The primary *jus gentium* comprises man's duty to God, and to other

* Matt. xxii. 37—39.

† Zallinger, *Instit. Jur. Natur. et Ecclesiastici* Publ. lib. 1, c. 4, § 22.

† Donelli *Comment. lib. 1, cap. 7, § 8, 9; Reiffenstuel, Jus Canon. Univers. præm. § 2, num. 31—33.*

men in the common relations of human nature, without more. Such are the three beads enumerated by Pomponius—religious duty to God, and the obligation to our parents, and to the community in which we live.^a There may, it is true, be some doubt as to the third bead, because duty to the community pre-supposes an institution. Yet that institution, which Pomponius calls *patria*, may be held so necessary a part of human being that it is matter of primary law. And so Cujacius, commenting on this text, says that duty to our country should have been placed before filial duty.^b Again, the precept *alterum non ledere* belongs to the primary *jus gentium*.

The secondary *jus gentium* in the civil law is that which, though flowing from natural reason, arises from certain things instituted to meet human wants. Examples are given by Ulpian and Hermogenianus in the Pandects.^c The former begins by laying it down that the manumission of slaves is *jus gentium*. And he explains that by natural law all men are born free, and that by the usage of mankind—which he here calls *jus gentium*—slavery was introduced, and then came the benefit of manumission. Thus, manumission is matter of natural law, arising from the institution of slavery, which Florentinus describes as contrary to nature.^d

Hermogenianus, in the celebrated text often referred to before, enumerates a variety of heads of law arising from the introduction of the rights of property, and other institutions generated by the wants and interests of mankind. Donellus, commenting on this law, observes that the heads mentioned therein are somewhat confused, and it does not show how they are distinguished from the former branch of *jus gentium*. And then he proceeds to the exposition of the text, arguing that in the beginning of the world, when men were few, it was not necessary that things should be appropriated to individuals, but afterwards the institution of property became requisite to prevent strife and confusion, and for the better enjoyment of things, and for other purposes of society. Hence that great head of the secondary *jus gentium* which comprises the laws of property. And from the same source came the different contracts, and commerce, and dealings among men regarding property, all of which are referred to by Hermogenianus.

To secure these things, and for other purposes of life, bodies of men came together, and buildings were collected, constituting towns and cities. By those means men, being congregated together, were better

^a L. 2, ff. De Just. et Jur.

^b Cujac, Op. tom. 7, col. 23, E.

^c L. 4, 5, ff. De Just. et Jur.; Grotius, Droit de la G. l. 1, ch. 1, § 9, num. 7.

^d L. 4, § 1, ff. De Statu Hom.

able to secure and defend themselves, and to combine in the duties, and for the ends, of civilized life.

Then for the government of aggregations of men kingdoms were constituted, and different sorts of commonwealths created: and cities and kingdoms having been formed, wars arose, and thence sprung the laws of war. Such is the law regarding captures in war. And so Grotius says that the maxim *silent leges inter arma* applies only to the civil and ordinary laws which belong to times and affairs of peace.^a

Donellus observes that the things enumerated in the second branch of *jus gentium* are not so clearly belonging to natural law as those in the first. Thus no one can deny religious duty to God, and the obligations between parent and child, to be of natural law. But it may be doubted whether this is so with regard to the distribution of property, and to contracts, and the laws of war. These are part, not of the natural law innate in man, but of that which was by the guidance of nature afterwards introduced. They arose out of what Gajus calls *naturalis ratio*.^b And they are matters of natural law, because natural reason shows them to be requisite for the purposes of human society.^c

On this principle, and in accordance with the famous law of Hermogenianus, which we have been considering, Suarez holds that the political power of government, considered *per se*, is of divine right.^d

We must now briefly compare these important doctrines of the civil law with those laid down by Domat.

The general ties which God constitutes among men by their nature, and by their destination to the same end under the same laws, are evidently part of the first branch of the *jus gentium*. It is the same with regard to the first of the two kinds of particular engagements which, according to Domat, determine men to exercise towards some particular persons duties which cannot be performed towards all mankind. These are the bonds of marriage and those of blood and affinity.

The second kind of particular engagements is much more extensive, for we have seen that it comprehends all the other sorts of engagements arising from the intercommunion of men in the affairs and interests of social life. This class includes all the matters mentioned by Hermogenianus, and also those which he refers to by the last words of the text—*exceptis quibusdam qui a jure civili introductæ sunt*.

^a Grot. Droit de la G., Disc. Prelim. § 27.

^b L. 9, ff. De Just. et Jur.

^c Donelli Comment. lib. 1, cap. 7, § 16.

^d Suarez, De Leg. lib. 3, cap. 4, § 5.

These words regard a multitude of matters not part of the *jus gentium*, but instituted by municipal positive law, which is that described by Gajus—*Nam quod quisque populus ipse sibi jus constituit id ipsius civitatis proprium est: vocaturque jus civile, quasi jus proprium ipsius civitatis*.*

With this exception the second kind of particular engagements belongs to the secondary *jus gentium* of the civil law. Domat's classification is more comprehensive than that which we have been investigating in the civil law, because he draws the plan of human society regarded with reference to all the obligations and engagements which constitute and perpetuate it. And he gives that plan, on the foundation of the two first laws, in order to show how all that multiplicity of laws whereby mankind are governed flow from the two primary laws which are pointed out to man by his reason, and taught to him by positive revelation in the Gospel.

And here we see how the Christian Religion, by teaching man beyond doubt the real end of his creation, has given him a clearer view of law, which is the rule of his conduct, directing him towards that end. And as the end of his creation is contained in the first of the two laws, out of which the second flows, so must all laws be in some way derived from them. All laws are either immediate results of the two first, or else bear a relation to the order of society which is founded on them, and are consequences of some law derived directly from those two primary laws.

But all this will appear more clearly in the further prosecution of our inquiries.

The next chapter will explain the doctrines of the jurists respecting the division of natural law into parts, and compare it with the classification of Domat.

* L. 9, ff. De Just. et Jur.

CHAPTER V.

THE TWO BRANCHES OF NATURAL LAW—PRIMARY AND SECONDARY—
FURTHER CONSIDERED ACCORDING TO THE JURISTS.

THE doctrines of the Civil Law regarding the two branches of Natural Law have now been explained. We must consider the same subject according to the jurists who have taken a more extended view of it than the commentators on Justinian. The object in view is to give an account of a portion of legal science necessary for the useful study of jurisprudence; and also to compare Domat's masterly scheme with other systems. We shall subsequently find that by thus establishing fundamental classifications and principles on a broad and sure basis, we are able to attain a far more easy and complete initiation into the mysteries of Public Law than would be possible by more abrupt method.

We must now go on to consider the way in which the jurists have divided natural law, and compare it with the classification of ties or engagements springing from the two first laws, on which Domat has constructed his plan of society.

Zallinger thus describes the rights and obligations belonging to primary natural law. Innate rights and obligations (*jura connata*) are those which are based on the nature of man and of things; and as the nature of man is the same in each individual, so these rights and obligations are the same in like manner, and thus they are universal.* The first of them is a certain legal equality among men considered simply as such, whereby whatever is legally due to any one—that is to say, is just towards him—is in like manner just towards everyone else. There is not by the law of nature any legal prerogative of one man considered simply as such over another, whatever may be their difference in mental and physical powers.

From this doctrine many important doctrines of public law are derived. Vattel has thus shown the source from whence they flow as regards international law:—"As men are naturally equal, and their rights and obligations are the same, as equally proceeding from nature, so nations composed of men, and considered as free persons living together in a state of nature, are naturally equal, and have from nature the same rights and the same obligations. Power and weak-

* Zallinger, *Inst. Jur. Natur et Eccles.* lib. 1, § 15; Pufend. *Droit des Gens*, liv. 2, ch. 3, § 24.

ness produce no difference in this respect. A dwarf is as much a man as a giant; and a little republic is as much a sovereign state as the most puissant kingdom."

"A necessary consequence of this equality is that whatever is lawful for a nation is so also lawful to others, and *vice versa*."

"A nation is therefore mistress of her own actions, provided they do not affect the proper and perfect rights of another. . . .

"Nations being free, independent and equal, and each being bound to judge for herself what she ought to do for the performance of her duties, the effect of this is to cause, at least externally and among mankind, a perfect equality of rights among nations in the administration of their affairs and the result of their claims, irrespective of the intrinsic justice of their conduct, of which others have no right to judge definitively. Thus, what is lawful to one is lawful also to another, and they must be considered in human society as having equal rights."^b

Pufendorf has devoted a chapter to the consideration of this natural equality of men.^c He observes that the better to comprehend it, the doctrines of Hobbes should be examined. That writer reduces it to a mere equality of natural powers and faculties observable among grown-up men, from whence he infers that they all naturally have cause to fear each other. For he says, though one man be weaker than another, yet by the use of skill or stratagem, or by weapons, he can kill the stronger man, so that any full grown man can inflict on another, however strong he may be, the greatest of natural evils.^d Thus, those who have to fear from each other similar evils, being equal between themselves, and as those who can cause to each other the greatest evils can inflict on each other lesser ones, it follows that all men are naturally equal. Hobbes adds, that the inequality now existing among men owes its origin to civil laws. But Pufendorf observes, that that inequality derived from civil laws regards only the states and condition of men, and not their natural powers. Therefore, it is not correct reasoning to juxtapose the inequality introduced by civil laws to the natural equality of human powers. And he also disapproves of the position which Hobbes endeavours ingeniously to maintain, that there is more equality in the faculties of the mind than in the strength of the body among men. Hobbes advances, that prudence proceeds solely from experience, and nature gives that quality in an equal space of time to all those who apply to anything

^b Vattel, *Droit des Gens*, Prelim. § 18, 19.

^c Pufend. *Droit des Gens*, liv. 3, ch. 2; *Devoir de l'Homme et du Cit.* l. 1, ch. 6.

^d Hobbes, *Leviathan*, chap. 13.

with the same degree of application. But this is not so in general, as every day's experience shows, though in certain ordinary matters all men may be in some respects on a par. And though everyone is ready to resent being treated as below the usual level of human understanding, and disposed to dislike those who profess to be wiser than their fellows, yet it does not follow that no one will acknowledge another to be superior in skill or parts to himself. But no one has a right to require that those who are less wise and less able than himself should on that account submit to his rule without their consent, especially if they are satisfied with whatever capacity nature has given them.

The equality which we are considering is of another nature than that of which Hobbes writes. As Pufendorf observes, its recognition is very important to mankind, for without it a well-regulated harmony cannot be maintained in that great variety of degrees in which nature dispenses to men the advantages of the body and of the mind. As in a well-regulated commonwealth every citizen enjoys liberty equally, though one be more wealthy and more highly considered than another; thus whatever advantages an individual may have over others in respect of the natural qualities of the body and the mind, he is nevertheless bound to practise towards them the rules of Natural Law which they are bound to observe towards him. And he has no more right to injure them than they to hurt him. On the other hand even those who are most ill-treated by fortune and by nature are entitled to the full and peaceful enjoyment of the rights common to all men. In short, *cæteris paribus* there is no one of whatever condition who has not a right to require at the hands of others what they require from him. And to this principle is applicable that maxim of the Pandects, which says, *Quod quisque juris in alterum statuerit, ut ipse eodem jure utatur*.* And so Seneca says, *Prima pars æquitatis est æqualitas*.

This equality of right, or legal equality, is founded on the principle that as the duties of sociability and the social state are necessary consequences of the constitution of human nature considered as such, they impose on all men in common an equally powerful and indispensable obligation. And this equality of law requires that as those who have advantages should not injure or insult those who are less fortunate, so the latter should abstain from envying or dispoiling the former or disturbing them in the enjoyment of those advantages.

Pufendorf also calls this natural equality of men, *equality of power*, or of liberty. It consists, he says, in this. No one (with an exception which will be mentioned presently) has any authority over any one else irrespectively of some human act or institution or convention. This equality is superseded by the establishment of civil societies,

* Pand. lib. 2, tit. 2.

wherein one or more persons have power to govern and command the others, who are bound to obey, whereby great inequality of persons has resulted, and the distinction between subjects and sovereigns.

The exception referred to regards the status of fathers and mothers of families, and the relation between husband and wife, which produce an inequality of persons anterior to civil societies. But that inequality does not interfere with the natural equality which I have shown to exist between man and man considered simply as such. The relations between father and son, and husband and wife, are something super-added to that between man and man, and they do not indeed supersede that equality of rights which results from primary natural law. But to this subject we shall return.

As for the other inequalities existing in civil societies, they, as Pufendorf observes, clearly proceed from the will of the sovereign power. The inequalities among citizens after the institutions of sovereign power, proceeds either from the administration of the government, which requires that certain persons be entrusted by the sovereign to exercise over others a portion of the supreme authority, or from some privilege granted by the sovereign. The relative diversity of fortunes produces by itself no real inequalities among citizens. Great wealth indeed gives the means of injuring or benefiting others, and so is a source of influence. But even real civil inequalities do not destroy the legal consequences of the natural equality of men.[†]

The doctrine of natural equality is very important, not only as a fundamental principle of Natural Law, but because it establishes as it were a plane surface on which divers rights and obligations are built. If it were otherwise, if men were created not with equal primary natural rights and obligations, but in different conditions or status simply as men, it would follow that there must be a different natural law for different classes or kinds of men, and this would alter the whole science of jurisprudence.

Thus Pufendorf combats the opinion which existed among the Greeks, that some men were *naturally* slaves, contrary to that of Ulpian, who says, that all men are by natural law born free.[‡] There are, it is true, men who seem more fit to be slaves than to enjoy freedom. But a natural adaptation to a particular state or condition does not suffice to place a person in that state. And it is clear that the distinction between free men and slaves is not by natural law. So Florentinus says, that slavery is an institution of the *jus gentium*, whereby a man is subjected to the dominion of another, *contrary to*

[†] See on this subject, D'Aguesseau, *Essai sur l'Etat des Personnes*, D'Aguesseau, *Œuvres*, tom. 5, p. 416.

[‡] L. 4, ff. De Just. et Jur.

nature.^b He means that slavery is an institution of the arbitrary *jus gentium*, that is to say, a custom of nations arising out of war. And when Gajus says that the chief division in the law of persons classifies them as free men and slaves,¹ he refers to the classification of men not by natural law but by the Civil Law of Rome.

We may here observe how it is that this doctrine of the natural equality of men has been perverted and made the source of false theories. This has arisen from not seeing that the doctrine in question belongs only to primary natural law, or innate rights and obligations (*jura connata*) which arise from the nature of man simply considered, that is to say, the relation between men merely as such, without more. And all that is to be found on the subject in the writings of the great civilians jurists and theologians shows this. They all confine the doctrine of equality to the common rights of mankind, exclusive of the rights and obligations which arise from various peculiar relations which men bear to each other regarding the rights of persons and of things.

Thus we have seen that Domat² speaks of the general ties which God makes among men by their nature and their destination to one and the same end under the same laws.

But it is manifest, as he shows, that other particular ties must exist as well as those general ties with regard to which all men are equal. Primary natural law is evidently insufficient for the purposes of human society. And indeed the relations of father and child and husband and wife cause a natural inequality.

And natural equality and the rights arising therefrom are, as we have seen, so far from being incompatible with the various inequalities of power, arising from the wants of human society, that they actually confirm the rights springing from those inequalities. And such inequalities do not supersede or destroy the equality of men according to the primary natural law.

We must now pursue the subject of absolute or innate rights and obligations. From the doctrine of the equality in law of all men considered simply as such, it results that they have the same absolute rights. And thence it follows that no one should injure or infringe the absolute rights of another.

The duties of a man with reference to other men are of two classes. The first consists of those which are solely founded on the mutual obligations which the Creator imposes on men in common, simply as

^a L. 4, § 1, ff. De Statu Hom.

¹ L. 3, ff. De Statu Hom. And see *Somerset v. Stuart*, Lofft. 1; Zallinger, Inst. Jur. Nat. et Eccl. lib. 1, § 15; Montesq. Esprit des Loix, lib. 15, ch. 7.

² Domat, Traité des Loix, ch. 2, § 3.

such, and the other class supposes some human establishment, either instituted or adopted by men, or an adventitious or accessory state, such as that of father and son, master and servant, &c. The former must be practised by and towards all men, whereas the latter are obligatory only with reference to certain persons. This classification, taken from Zallinger and Pufendorf, very clearly shows the two branches into which the jurists divide Natural Law.¹

The absolute or innate duties of man with reference to other men are ranged by Pufendorf under three heads. The first consists of the general duty of doing no harm or injury to any one. This is the second of the three precepts of Ulpian, namely, *alterum non lædere*.² A consequence thereof is the obligation of making reparation or compensation for any injury or damage which you have done to any one. Zallinger observes, that this is not properly itself an absolute obligation and right, because it arises from an act done. But it is nevertheless correctly placed by Pufendorf, because it is a necessary consequence of the rule of law *alterum non lædere*, and included therein. The second head comprises all the rights and obligations arising from the natural equality of men. The third includes what are called the common duties of humanity. "The third general duty," says Pufendorf, "whereby you are bound towards all other persons, considered simply as members of the human race, is, that each ought to contribute, so far as he conveniently can, to the benefit and advantage of others."³

The duties included under this general head are those which have been called *of imperfect obligation*.⁴ They are comprehended in *universal justice*, which requires the performance of all duties towards others: whereas *particular justice* regards only those which, because they are necessary for the preservation of mankind and the maintenance of human society in general, may be enforced by human authority and power.

These duties of imperfect obligation are virtues belonging to the province of morality and religion. And yet they also appertain to natural law, because even the mere outward fulfilment of those obligations is highly beneficial to the peace and welfare of society. And so Pothier observes, in a note on the first precept of Ulpian,—*honeste vivere*,—that it forbids not only what is forbidden by express laws, but

¹ Zallinger, *Inst. Jur. Nat. et Eccles. Publ. lib. 1, § 15*; Pufend. *Devoir de l'Homme et du Cit. l. 1, ch. 4, § 1*; Pufend. *Droit des Gens, l. 2, ch. 3, § 24*.

² L. 10, § 1, ff. *De Just. et Jur.*

³ Pufend. *Devoir de l'Homme et du Cit. ch. 8*.

⁴ Pufend. *ibid. l. 1, ch. 2, § 14, n. 1*, Barbeyrac; and see Pufend. *Droit des Gens, l. 1, c. 7, § 7, 8*. The same doctrine is less clearly expressed by Zallinger, *Inst. Jur. Nat. et Eccles. Publ. lib. 1, § 17*.

everything against good morals, piety and honour.^p And Papinian, in a celebrated law in the Pandects, says, defining legal impossibility, *Que facta verecundiam, officium, pietatem nostram laidunt, et generaliter contra bonos mores sunt, nec facere nos posse dicendum est.*^q And so St. Thomas Aquinas includes in natural law, not only precepts, but counsels.^r

This general view of the obligations called innate, and belonging to primary natural law, shows that they do not suffice by themselves, because they look on each man, apart from any dealing or engagement with other men, and from any of those establishments or institutions, such as civil government and property, which are requisite for human society. And this observation leads us to hypothetical or conditional obligations, with their correlative rights. They are matter of secondary natural law.

Zallinger defines them to be those rights and obligations which cannot exist except on the hypothesis of some previous act, or adventitious status, and circumstances of place and time. According to him hypothetical rights and obligations are of three classes; as they arise from agreement or pact, from the abolition of the community of things, that is to say, the introduction of exclusive property, and from social states or conditions.^s So we have seen that Domat teaches, that besides those general and common ties which God has constituted among men by their nature and their destination to the same end under the same laws, He has added other particular engagements. And these are of two kinds, namely, those which are formed by the natural ties of marriage and birth, comprising consanguinity and affinity; and in the second place, those which arise from other sorts of engagements among men.^t

The right which men have of hindering themselves, by their consent, is an original or innate or absolute right. And so Savigny, treating of *relations of law*, that is to say, legal obligations and rights arising between individuals, starts from the free will of man to act within certain limits of right. He shows that that will may be applied to things or to persons. And by virtue of it we may have dominion over things, or over some act or acts of another person. In the former case the result is *property* in its simplest form, and in the latter, what is designated as *obligation*, that is to say, the relation of law, whereby we control a

^p Pothier, Pand. Justin. lib. 50, tit. 17, sect. 1, art. 2, l. 18.

^q L. 15, ff. De Condition. Instit.

^r Suarez, De Leg. lib. 2, cap. 8, § 11.

^s Zallinger, ubi sup. lib. 1, cap. 3, § 16. The first class here added by Zallinger seems grounded on a too subtle distinction. Pufend. Droit des Gens, l. 2, ch. 3, § 24.

^t Domat, Loix Civ. Traité des Loix, ch. 2, § 3.

determined act or acts of a person.* This obligation may resolve itself into a sum of money or some other thing, that is to say, transfer property to us. And the greater number of obligations have for their object the absolute acquisition or the temporary enjoyment of property. The aggregate of the relations which thus extend the power of an individual over things, is called his property (*bong*), and the institutions which regulate them are called the *law of things*.†

The obligations and rights thus described and classified by Savigny are what the jurists call hypothetical, or conditional, and they belong to secondary natural law, so far as they are not regulated by positive law. They are called hypothetical or conditional, because they presuppose an act of human will, and the institution of property; that is to say, exclusive rights over things. Zallinger observes that the greater number of hypothetical obligations spring from the introduction of *dominium*, or the right of property. Taken in its widest sense, it includes both dominion over the thing itself, irrespective of right as against any particular person, and right to a thing by virtue of an obligation of a person, arising either from consent, or from the law without such consent, but in consequence of some fact. The former is called *jus in re* or *dominium*, in the strict acceptation of the term, and the latter *jus ad rem*.‡

The social state and its consequences are also the causes of a multitude of hypothetical or conditional rights and obligations, which, except so far as they belong to positive law, are also part of the secondary natural law.

All these heads of hypothetical or conditional obligations are among those particular ties, as contradistinguished from the general ties, which, according to Domat, unite men among themselves. And they are originally grounded on the two primary laws, for as God has directed man to accomplish those laws, and for that purpose has destined him for society, so He has ordained those rights and obligations which are the ties uniting men in that state, and rendering it capable of accomplishing the object for which it was instituted.

We have now sufficiently examined the distinction between the two chief branches of natural law, as taught by the civilians and jurists, and we have shown the bearing of their doctrines on the plan drawn by Domat in his treatise of laws.

The full value of this will appear, when we come to consider the various sorts of laws by which society is governed, and the ways in which they accomplish their object.

* Savigny, *Traité du Droit Rom.* tom. 1, ch. 1, p. 328—333, § 53.

† *Ibid.* pp. 333, 334.

‡ Zallinger, *ubi supra*, § 16, 3.

CHAPTER VI.

GENERAL PLAN AND NATURE OF HUMAN SOCIETY ON THE FOUNDATION
OF THE TWO PRIMARY LAWS.

WE have examined the general character of the two branches of natural law, and their connection with the two primary laws on which Domat has founded his plan of human society. That investigation shows how the distinction between primary and secondary natural law bears upon the classification given by Domat of the ties which unite men in the association to which they are destined, for the exercise and accomplishment of the two great fundamental or primary laws prescribing man's duty to God and to his neighbour.

Thus the general ties which God has constituted among men by their nature, and their destination to the same end under the same laws, belong to primary natural law.* But those general ties are not sufficient, and the particular engagements which bind men together in the exercise of the second of the two great primary laws, constitute particular laws prescribing to every man what that law requires of him. These, for the most part, belong to secondary natural law, because they pre-suppose some act done, such as a contract, or some institution, such as property and civil society.

I say for the most part, because among the particular ties are those which arise from the relation between the two sexes, which are so necessary a part of human nature that they must be considered as matters of primary natural law.

It will appear more and more, as we proceed, that these distinctions and classifications are valuable both for scientific and for practical purposes.

We will now see how Domat works out his plan of human society on the foundation of the two fundamental or primary laws—commanding love of God and of our neighbour.

He first lays it down that God forms the order of human society, by the ties of both sorts, to bind men together in the exercise of the second law. And because each engagement shows what it prescribes to those whom He has bound by it, we may see in the characteristics of the different sorts of engagements, the foundations of the rules of that

* Florentinus says, "Inter nos cognitionem quamdam natura constituit;" l. 3, ff. De Just. et Jur.

which justice and equity require of each person according as he is placed.

Domat then proceeds to the first sort of those particular engagements among mankind—those which marriage constitutes—with all its consequences. Marriage and the birth of children constitute a particular society in each family, which has been held to be the germ of all others.

In a law of Ulpian we find both the conjunction which among mankind is called marriage, and the care and rearing of the young, included among the things regulated by that supposed natural law common to man and other animals.^b And Pomponius holds the obligations between children and parents to be of primary natural law.^c Thus Domat, placing the engagement of marriage first among the particular ties which unite men in society, teaches that not only all the laws regulating the duties of husband and wife, but also the laws of the Church, and the civil laws regarding marriage, are founded on the mode in which God instituted that engagement at the creation of man.

The bond of marriage is followed by that of birth, which unites the parents with their children, and is the foundation of all the duties arising from that relation. Thus children are made dependent on their parents in their infancy, and the parents on their children in age and infirmity; and a strong mutual affection is implanted in the breasts of both by the Creator. Thence comes all that civil laws have regulated regarding the reciprocal duties of parent and child—such as the paternal power over the persons and property of children, and the right of parents to receive aliment from them. And on the same ordinance of God, whereby children receive life from their parents, are grounded the laws which give the property of the parents at their death to their children. The reason is, that property is given to men for the different wants of life. Therefore, on the death of their parents, the inheritance should devolve on the surviving issue as an accessory of life derived from their progenitors.

Marriage and birth also constitute two other sorts of natural ties, which are consequences following them. The first is that of collaterals, called consanguinity or agnation, and the latter is that of alliance, or affinity or cognation.

Consanguinity unites collaterals, that is to say, those whose birth originates from a common ascendant or ancestor, and hence is derived the relationship which unites them. This connexion is the foundation

^b L. 1, ff. De Just. et Jur.

^c L. 2, ff. De Just. et Jur. . And see Suarez, De Leg. lib. 3, ch. 1, § 1.

of divers civil laws in different countries—such as those which forbid marriages among near relatives, give inheritances and guardianships, and exclude witnesses and judges related to a party to a suit.

Alliance or affinity is the connexion which marriage constitutes between the husband and his wife's relations, and the wife and her husband's relations. It is grounded on the close union between the husband and the wife, whereby those who are bound by relationship to either of them, are also bound to the other. And it is the reason of many laws analogous to those just mentioned.^d

This sketch will suffice to show the nature of the first sort of ties which unite men together, and whereby God has bound them in order to the formation of civil society.

We now proceed to the second kind of engagements or ties; and this is, perhaps, the most masterly part of Domat's celebrated plan.*

As the engagements of marriage and birth, and the ties resulting from them, are limited between particular persons with regard to each other, and God has placed men in society to exercise generally the second of the two primary laws, He has rendered necessary in society another sort of engagements, which bind together indifferently persons of all kinds. It is to constitute this sort of engagements that God multiplies the wants of men, and makes them necessary to each other for all those wants. And in two ways they are placed in the order of engagements to which they are destined.

The first of these ways is the arrangement of persons in society, where each has his place assigned to him, indicating the relations which bind him to others, and the duties proper to that place. And this is effected by birth, by education, by disposition or inclination, and by the other effects of his conduct, which cause the arrangement or placing of men in the community to which they belong. By this first means God constitutes to all men the general engagements of conditions, professions, and employments, and places every person in some certain condition of life of which particular engagements are to be the consequences.

The second way is the disposal of events and conjunctures which lead each man to particular engagements, according to the occasions and circumstances in which he finds himself.

All these sorts of engagements of this second kind are either voluntary or not voluntary; that is to say, they arise from consent, or are constituted independently of the consent of the party bound. For as man is free there are engagements into which he enters by his will; and as he is dependent on the Divine order, so there are engagements

^d Domat, *Loix Civ. Traité des Loix*, ch. 3.

* *Ibi*, ch. 4.

in which God places him without his own choice. But whether the engagements originate from, or independently of, his consent, it is by his free will that man acts in them. And every part of his conduct bears these two characteristics—that is to say, dependence on God, whose ordinance he ought to follow, and his free will, which should lead him to that obedience. Thus all these kinds of engagements are proportioned both to the nature of man and to his condition during this life.

The voluntary engagements are of two kinds. Some are mutually formed among two or more persons, who by their will bind and engage themselves reciprocally one to another. And others are constituted by the will of one person, who engages himself to another person or persons without their treating with him.

Domat gives the following examples of these two kinds of engagements. As an illustration of the first kind, he observes, that for the different purposes for which men require to communicate one with another their work and industry, and for the different commerce in all sorts of things, they form associations or partnerships, buy and sell, let and hire, borrow and lend, exchange, and enter into other sorts of mutual contracts.

And to explain the second kind of engagements, Domat refers to that of an heir, who becomes liable, according to the civil law, to the debts of the deceased. For by the civil law an heir (whether testamentary or legal) is *una eademque persona cum defuncto*,¹ and, therefore, is liable for all his debts that are not extinguished by his death. The old civil law was modified in this respect, for Justinian granted to heirs the benefit of inventory, that is to say, the power to provide an authentic inventory of the estate and effects, and thereby discharge themselves from all liability to his debts beyond the value of the inheritance.² But still the principle of hereditary representation remains part of the civil law. And it is evident that the engagement of the heir to the creditors of the deceased, arises without any agreement or dealing between him and them. Another instance of this sort is to be found in the civil law *quasi contract*, called *negotiorum gestorum*. It is thus explained by Justinian: "When any one has transacted the business of an absent man (*negotia absentis gesserit*) there arise mutual actions between them, which are called actions *negotiorum gestorum*." The person who received the service has the *actio directa*, and the other the *actio contraria*. These actions spring from no contract, for they obtain where any one spontaneously undertakes business or the

¹ See my Commentaries on the Modern Civil Law, p. 299.

² Instit. lib. 2, tit. 12, De Heredum Qualitate, § 5. And see Cod. lib. 6, tit. 30, De Jure Deliberandi, L. ult.

management of the property of another, without any mandate or authority. This law was received by reason of its utility, that the business of those who are absent may not be neglected: for no one would take this care upon himself unless he had an action to recover what he had expended."^b A further example of this nature is to be found in divers offices or employments, the acceptance of which produces an obligation to fulfil the engagements that are the consequences thereof. The person accepting such office or employment is bound to those interested in its duties, though there is no agreement or dealing between him and them.

We come now to involuntary engagements. They are those in which men are placed without their own will and choice. Thus there are municipal and legal offices or duties, such as that of sheriff and jurymen, which some persons are not permitted to decline without lawful excuse. So it is with the office of guardian in the civil law. And when the business of an absent man has been done without his knowledge and authority, the civil law requires him to repay what has been reasonably expended and to ratify what has been well done.¹ He whose merchandise has been saved in a storm by the ship being discharged of goods thrown into the sea to lighten it, is bound to bear his share of the loss in proportion to what is saved for him.² The condition of those without means and incapable of working for their subsistence ingenders an engagement on the part of the others to exercise towards them the second of the two fundamental laws which prescribes our duty to our neighbours, by enabling them to live. And on this principle the poor law is founded as Blackstone shows. And so Domat lays it down that every man being a member of society has a right to live therein; and what is necessary for those who have nothing and cannot earn their livelihood is consequently in the hands of the others, who cannot therefore refuse them relief. On the same principle, in times of public necessity individuals are compelled, even by legal authority, to assist the poor according to their wants.³ And so the condition of persons suffering from injustice and oppression or unlawful wrong causes an engagement on the part of those who are invested with offices of justice and good government to protect them.⁴

To these examples may be added the various obligations incumbent on every man as a member of human society, which are independent

^b Instit. lib. 3, tit. 28, § 1.

¹ *Ibi*; and see the French Civil Code, art. 1372.

² Pandect. lib. 14, tit. 2, ad Leg. Rhodiam; Voet ad Pand. lib. 14, tit. 2, and the authors cited there; French Code Civ. 415.

³ Domat, *Traité des Loix*, ch. 4, § 4.

⁴ See Magna Chart. Nulli negabimus, &c.

of his own act or consent, because he cannot refuse to fulfil those obligations without violating secondary natural law. And that law arises from the ordinance of God and not from the will of man.

This theory of obligations, arising without the act and consent of the party bound, is a very important part of Public Law, which we shall have occasion to examine further hereafter. The false doctrines of Rousseau, in his *Contrat Social*, may be traced to ignorance of this subject. His system is based on the false notion that all obligations and engagements must arise from consent of the party bound.^a

That notion is partly countenanced by the error of Trebonian, who, in the Institutes, entitles obligations arising neither from a contract nor from a wrong, by the denomination of obligations *quasi ex contractu*. And this some civilians have explained by deducing those obligations arising without consent, from tacit or presumed or feigned consent.^b But the correct doctrine is that they are independent of consent and have therefore nothing in common with contracts, but they arise from the law. Obligations arising thus from the law without consent or agreement are of two classes. First, those which spring from the law alone, without any act of the person on whom the obligation is imposed. Secondly, those which arise from the law, on the occasion of an act of the person obliged, or of an act of the person to whom he becomes bound, or of a fortuitous occurrence.^c The obligations whereby every man is bound to pay taxes and perform certain public duties in the community to which he belongs, are instances of obligations springing from the law alone.

Obligations of the first class arise immediately, as those of the second spring mediately from the law, for every obligation must proceed from the law, either natural or municipal.

Obligations arising mediately from the law are brought into existence by the law on the occasion of some act. Thus the obligation of a thief to restore the goods which he has stolen, arises from the law of property to which he has rendered himself amenable by his own act.

The act of the person to be bound thus precedes the obligation, and is a condition precedent to the existence of the obligation; but the obligation springs from the law on the occasion of the act.

That act may be either lawful or unlawful. Of the first description are those obligations which Trebonian in Justinian's Institutes derives *quasi ex contractu*, and of the second are those which he deduces *ex delicto* and *quasi ex delicto*.^d

^a Rousseau, *Contrat Social*, ch. 4.

^b See my Commentaries on the Modern Civil Law, ch. 11, where the subject is fully explained.

^c *Ibi*, p. 236.

^d *Ibi*, pp. 236, 237.

All these various classes and descriptions of engagements bind mankind together in a multitude of different ways in that social condition for which they are intended. And it is evident, as Domat tells us, that God constitutes them and places men under them for the purpose of uniting mankind together in the exercise of the second fundamental law, commanding us to love our neighbour.* And all the duties prescribed by those engagements are the effects which that law ought to produce according to the different conjunctures and circumstances. Thus the rules which prescribe to render to every man what is due to him, to wrong no one, and to observe faithfulness to promises, and sincerity,^a are included in the second law. And the same may be said of the duties of a guardian to his ward, and of persons holding offices and employments, and indeed of the duties required by all other engagements among men. Domat gives as an example the case of a man who has in his possession the sword of a madman, or of a person inflamed with violent passion. He is bound by virtue of the second law not to restore the weapon to its owner until he is in a condition to make no bad use of it.

And that great jurist adds, that his object is to show that as the second fundamental law is the spirit and principle of all those which regulate engagements among mankind, it is not sufficient to know, as even barbarians do, that we ought to render to every man that which is his, and to wrong no one, and to observe good faith, and similar rules; but it is necessary also to regard the spirit of those rules and the source of their truth in the second law, in order to give them all the effect and extent which they ought to have. And he observes, that for want of this doctrine judges sometimes look upon those rules simply as political laws, without understanding their spirit, which requires a more abundant justice, and therefore do not give them the extensive effect which they ought to have, but tolerate breaches of faith and injustice which judges would repress if the spirit of the second law were their principle.

Domat further observes, that engagements require the use of a government to keep every one in the order of their obligations. It is for the purposes of government that God has established the authority of powers requisite to maintain society. And it is necessary to add here with regard to engagements and government, that there are some constituted through the order of that government, such as those between princes and subjects, and between persons in public dignities and offices and private persons, and others of that nature.

* Domat, *Loix Civ. Traité des Loix*, ch. 4, § 5.

^a *L. ff. De Just. et Jur.*

One great feature of this general plan, drawn by the masterly hand of Domat under the immediate advice of the Chancellor D'Aguesseau, is, that it is based not on any imaginary system or hypothesis such as the social compact, or that state of hostility among men invented by Hobbes, but on the different classes of ties or obligations which actually unite men together in the social state, and are all deduced from the two primary laws laid down in the Gospel as the foundation of all law.

Domat constructs his system by analysis of human society, showing the means whereby Divine Providence has led mankind to, and maintains them in the social state, according to the principles of the law of nature.

In order to complete the plan of society, it is now necessary to give an idea of the succession which perpetuates it; and we shall next see how God causes it to subsist in its present state.

The order of successions is grounded on the necessity of continuing and transmitting the state of society from the passing generation to that which follows. And this is done imperceptibly, by causing certain persons to succeed in the place of those who die, to enter into their rights, their duties, and those relations and engagements which are of a nature to pass to successors.

It would be out of place to enter here into the different modes of succession or inheritance by the natural order and that of municipal laws, and by the will of persons appointing those who are to succeed them. It is sufficient to observe here, that successions must be distinguished from the engagements hitherto considered. For though succession constitutes an engagement into which those persons enter who succeed to others, yet successions ought not to be considered under this aspect. They should be looked upon with reference to the change by which property, rights, and obligations, pass from those who die to their successors.¹

According to the civil law, which makes the heir, or the coheirs, the representative of the deceased, this view of successions is obvious. And even in the English and Scotch laws, which make a distinction between real and personal, or heritable and personal estate, it is correct. For the executor or administrator must be considered as the temporary successor of the deceased in his personal property, which is vested in him until he has fully administered the estate. But with reference to Public Law the heir is the principal successor, because he succeeds to real property and hereditary dignities and offices, and takes the place in the community which was occupied by the deceased. And legatees may be looked upon as successors of the deceased, so far as regards the legacy which is transmitted from him.

¹ Domat, *Loix Civ. Traité des Loix*, ch. 7.

A legal capacity also belongs to certain fictitious beings, called juridical persons, which exist only for certain legal purposes. Their legal character appertains, as Savigny observes, principally to private law having reference to property,* but they cannot be omitted in a plan of human society.

With respect to these corporate bodies, called in the civil law *universitates*, which are considered in law in the light of persons,† they have no successors, for they are invested with a sort of legal privilege of immortality. Yet there is a succession within them whereby new members are put in the place of those who die, or cease to be members. This succession is regulated according to the constitution of each corporate body. Although the parts composing these bodies be constantly changed, yet the identity of the whole remains.‡ And persons succeed others in various offices and employments by different ways, such as appointment and election.

By all these means society is perpetuated and handed down from one generation to another, with the various modifications which from time to time it undergoes.

We have now to consider the condition of society after the fall of man, and how God makes it subsist in the condition to which that fall reduced it.

Domat teaches, that everything we see in society contrary to order is a natural consequence of disobedience to the first law, which commands the love of God; for as that law is the foundation of the second, which commands men to love each other, man could not violate the first without falling at the same time into a condition which made him break the second also, and consequently disturb society.

The first law (continues the great civilian) should have united men in the possession of the Supreme Good, and they would have found therein two perfections which would have made them happy in common, one that it may be possessed by all, and the other that it can form the entire happiness of each. But man, having broken the first law, and having forsaken that true happiness which he could only find in God, sought it in material temporal things, in which he found two defects, one that those things cannot be possessed by all, and the other that they cannot make any one perfectly happy. Thence divisions and discord necessarily arose, because those who place their happiness in the possession of things of that nature, must clash in their pursuit

* Savigny, *Traité de Droit Romain*, tom. 2, pp. 234, 236.

† Voet, *Comm. ad Pand. lib. 3, tit. 4, § 1*; *Pand. lib. 46, tit. 1, De Fidejussoribus*, l. 22. And see Domat, *Droit Publ. liv. 1, tit. 15*.

‡ *Pand. lib. 5, tit. 1, De Judiciis*, l. 76; *Pand. lib. 3, tit. 4, Quod cujusque Universitatis nomine*, l. 7, § 2.

of the same objects, and they violate all kinds of obligations and engagements, according to the dictates of their desire for the things which they seek to obtain.*

But out of that principle of selfishness, contrary to the mutual good will which is the foundation of society, God has devised a remedy which causes it to subsist. For that principle of division among men becomes a bond which unites them in a thousand ways, and maintains the greater part of their engagements. The following reasons will show the truth of this position.

The fall of man multiplied his wants and augmented the necessity of labour and commerce, and also of engagements and ties among men; for as no one can alone suffice to himself, the diversity of wants engages men to an infinite diversity of ties or connections without which they could not live.

This condition of mankind leads those who act only on selfish motives, to submit themselves to labour and engage in commerce and obligations which their wants render necessary. And in order to render those things useful to themselves, they are obliged, for the sake of their credit reputation and interest, to observe good faith and honesty. Thus selfishness adapts itself to circumstances, and knows so well how to regulate the means according to the end in view, that it even imitates all the virtues.

Self-love therefore, that principle of evil, is in the present state of society a cause of many effects which, being in themselves good, ought to have a better origin; and thus that poison of society may be regarded as a remedy provided by God to sustain it.

The other causes whereby God sustains society are of a different nature, because they are not evils out of which good is produced, but they are the natural foundations of order. Domat divides them into four different sorts, comprehending all that maintains society.

The first is Religion, which causes all that is regulated by the spirit of the two primary laws.

The second is the secret providence of God over society in the whole world.

The third is the authority which God gives to powers.

The fourth is that light retained by man after his fall, which teaches him the natural rules of right and wrong.

It is that light of reason which, showing to all men the common rules of justice and equity binding upon them by the Divine Will, is a law to them;† and it has remained in their minds in spite of the

* Domat, *Loix Civ. Traité des Loix*, ch. 9, § 1.

† Rom. ii. 14; L. 7, ff. De bon. damn.; Schmalzgrueber, *Jus Eccles. Univers.*; Disser. præm. § ii. 54; Suarez, *De Leg.* lib. 1, c. 6, n. 13.

darkness which self-love has spread there. Thus all men bear in their minds the impression of the truth and authority of these natural laws, that they ought to wrong no man, that they should render to every one what belongs to him, that they are bound to be honest in engagements, and faithful to execute promises, and other similar rules of justice; for the knowledge of these rules is inseparable from reason, and indeed reason itself is their knowledge and use.

And, as Domat truly observes, though this light of reason giving a perception of those truths to men ignorant of their first principles, does not reign over every one in such wise as to make him regulate his conduct thereby, yet it so far prevails, that even the most unjust, love justice enough to condemn and hate injustice in others; and each man being interested in the observance of those rules towards himself, the greater number compel obedience on the part of those who resist their precepts and commit wrong against others. This shows that God has engraven on the minds of all men, that sort of knowledge and love of justice without which society could not subsist. And by means of that knowledge of natural laws, even nations ignorant of religion have maintained their society.

But this would not suffice to be the foundation of society without the government which God exercises over mankind, and the order which is preserved in human society by Divine Providence. Thereby the earth is divided among the human species; nations are distinguished one from the other with the diversity of kingdoms, republics, and other kinds of states; their extent and duration are determined by the course of events, and society is sustained in each state by the distinction of persons to fill different stations, employments, and places. And the same Providence, to maintain society, establishes therein two kinds of powers calculated to keep men in the order of their engagements.

The first consists in natural powers regarding natural engagements, such as the authority which marriage gives to a husband over his wife, and birth to parents over their children. But as this sort of authority is restricted within the limits of families, God has ordained another kind of authority extending over the universal order of all sorts of engagements and all that regards society. And He gives this power differently in kingdoms, republics and other states,—to kings, princes, and other persons raised into authority by birth, by election, and by other means. And for the same order the exercise of that authority is communicated to and distributed among different persons, with various sorts of degrees and power.

We have now a sketch of the nature of human society, showing its derivation from the two primary laws, by means of the ties which constitute and maintain it.

We must next examine the nature and spirit of the various sorts of laws which govern mankind, and which are all derived from those two primary fundamental Divine Laws.

CHAPTER VII.

ON THE NATURE AND SPIRIT OF LAWS.—IMMUTABLE LAWS.

IN the last chapter a plan of society has been drawn on the foundation of the two great first Laws, by showing the relation which the state of man in this life has to each of them, and the way in which God having destined man to society has constituted the ties which engage him in that state.

We have seen that it is by those ties or engagements that God forms the order of the society of mankind to link them together in the exercise of the second Law. And as God marks in every engagement what He enjoins to those who are bound by it, so the characters of the different sorts of engagements show the foundations of the several rules prescribing that which justice and equity require of every person according to the conjunctures in which his particular engagements place him. We have seen how ties or engagements imply and require the use and advantage of a civil government to restrain every one within the order of those that belong to him. And we have seen also that there are four foundations of the order of society in its present state, that is to say, the general knowledge of justice or right and wrong, the government of God over society, the authority which God gives to supreme powers, and true religion, which includes and explains the three first.

And in a former chapter I have shown the origin and necessity of laws, whereby the actions of men are regulated in all the relations and engagements in which they are placed on earth; and this according to the definition of St. Thomas Aquinas, who says, *Lex est quædam regula et mensura secundum quam inducitur aliquis ad agendum vel non agendum.*

We must now proceed to examine the nature and spirit of laws and their different kinds.

Suarez first divides laws into Eternal and Temporal Laws. By the former he means (following St. Augustine) what Plato calls Divine Law, that is to say, a law existing in God himself and the same with the reason of Divine Providence. The latter differs from it as that which is created differs from that which is uncreated. It includes that kind of

Divine Law, which God creates, as it were, extraneously to himself, as well as all other laws that are not eternal.

Suarez then gives the distinction recognised by all the theologians, and frequently used in the works of the Saints, that is to say, that of natural from positive law.^b It is also to be found in the Pandects.^c

This distinction is the basis of the system of Domat, to which we will principally direct our attention.

Domat begins by laying it down that every sort of laws may be reduced to two kinds, which comprehend all laws of whatever nature.

One is, of the laws which are immutable, and the other of those that are arbitrary. These two characters are the most essential part of the nature of all laws.

The former class of laws include those which the theologians comprise under the term *Lex æterna*. St. Augustine says, *Legem æternam esse summam rationem in Deo existentem cui obtemperandum est*.^d The latter words show that he means natural law, considered as a rule of conduct applied to men, and this remarkable passage agrees with the definition of St. Thomas Aquinas. *Lex naturalis nihil aliud est quam participatio legis æternæ in rationali creatura*.^e But this part of the subject should be fully explained before we proceed, because it is important to establish fundamental doctrines as clearly as possible.

St. Thomas Aquinas discusses the question whether it can properly be said that the attribute of justice belongs to God, and, according to his usual method, he states divers objections, the chief point of which consists in the difficulty of supposing justice where there is perfect freedom of will, and no duty or obligation.

He answers that there are two species of justice. One consists in mutual obligations or giving and accepting, such for instance as buying and selling, and other communications or commutations of like nature, which is called commutative justice. And this cannot be an attribute of God. The other species consists in distribution, and is called distributive justice, according to which a governor gives to each in proportion to his deserts.^f Grotius explains the same distinction, and says, that distributive justice, considered as a rule of human actions, is the companion of the virtues which tend solely to the advantage of others, such as liberality, compassion and wise conduct in the government of a state.^g

^b Suarez, De Leg. lib. 1, cap. 3, § 6, 7.

^c Pand. lib. 1, tit. 1, l. 9.

^d L. 1, De liber. Arbitr. c. 6.

^e 1, 2, quest. 91, art. 2.

^f Div. Thom. Summa Theol. par. 1, quest. 21, art. 1.

^g Grot. Dr. de la G. l. 1, ch. 1, § 8; Pufend. Dr. de la N. et des Gens, l. 1, ch. 7, § 11.

St. Thomas continues, "As therefore the fitting and due government of a family, or of any multitude, shows this sort of justice in their ruler, so the order of the universe, which appears both in natural things and in voluntary things, shows the justice of God." "As a right apprehended by the intellect is the object of will, it is impossible that God should will anything except that which is according to the rule of his wisdom. Hence he does justly according to his will, as we do justly what we do according to the law. But we act according to the law of a superior, whilst God is a law to himself." St. Thomas goes on to show that in one sense things may be due from the Divine will. For it is due to things created that they should have that to which they are ordained, and so God works justice by giving to each that which is due to it according to the principles of its nature and condition as Divine wisdom has ordained. So that God's justice consists in the fulfilment of His wisdom. On the other hand it is due of right to God that his wisdom and his will should be fulfilled. *Debitum est Deo ut impleatur in rebus id quod ejus sapientia et voluntas habet et quod suam bonitatem manifestat : et secundum hoc justitia Dei respicit decentiam ipsius secundum quam reddit sibi quod sibi debetur.*^b

From these doctrines several important consequences may be deduced. They explain the celebrated dispute between Barbeyrac and Leibnitz respecting the efficient cause of natural law.¹ Leibnitz charged Pufendorf with seeking that efficient cause, not in the nature of things and the maxims of right reason conformable thereto, and which emanate from the Divine mind, but simply in the will of a superior. Barbeyrac, however, shows that Pufendorf admits, in accordance with St. Thomas, a natural law, founded on the nature of things, which the Divine will could not contravene without being inconsistent with itself.² And then he continues thus : "Our author does not pretend that all that is called right or justice emanates from the arbitrary will of a superior. He speaks of right and justice which are fitting for independent beings. And he seeks for the rule of human actions. He says that God is supremely just and follows inviolably the rules of justice, which are in conformity with His infinite perfections ; so that He cannot act otherwise, but also, no one can require Him to act in a particular manner. And Pufendorf holds that with regard to men, though they are entirely dependant on the Creator, yet God has not made right and justice by an arbitrary will ; and that God could not,

^a Div. Thom. Summa Theol. par. 1, quæst. 21, art. 1. And see Grotius, Dr. de la G. l. 1, ch. 1, § 10, num. 5.

^b Jugement d'un Anonyme, p. 406, printed with the Devoir de l'Homme et du Citoyen, edit. Amsterdam, 1735.

^c Pufend. Droit de la Nat. et des Gens, l. 1, ch. 2, § 5, 6.

without inconsistency with his own perfections, prescribe to men any other rules than those of justice. But our writer maintains, notwithstanding, that the will of God, who, as their sovereign master, has full right to restrain their freedom as he thinks fit, is the proper and direct reason why men are obliged, and under a moral necessity, to obey the rules of justice."

The doctrine of St. Thomas respecting the nature of Divine justice, and Barbeyrac's explanation of Pufendorf's meaning, show that the idea of justice is not necessarily connected with that of a superior, if justice be regarded abstractedly. But if considered as a law for mankind, that is to say, as a rule of human actions, its obligatory force must emanate from a superior. Thus Grotius defines natural law to be principles of right reason which enable us to know that a certain action is right or wrong, according to its congruity or incongruity with the reasonable and social nature of man, and, consequently, that God, who is the author of nature, commands or forbids the action.¹ And with this definition the canonists agree.² And we have seen in the preceding chapter, that the light retained by man after his fall, which teaches him the natural rules of right and wrong, is one of the causes whereby God sustains society, and one of the natural foundations of order therein.

The doctrines of St. Thomas regarding Divine justice also show why it is that natural law is immutable. For, as it is impossible to suppose that God can prescribe to men any rules of conduct inconsistent with the Divine justice, so those rules must be immutable with the justice from which they emanate.³

We have now to discover the root of those immutable laws. Domat tells us that they are called immutable, because they are naturally so just, always and everywhere, that no authority can change or abolish them, whereas arbitrary laws are those which a lawful authority can establish, change, and abolish, according to circumstances. And he continues thus—"These immutable or natural laws are all those which are necessary consequences of the two primary laws, and so essential to the engagements which form the order of society, that they could not be altered without injuring or destroying the foundations of that order. But arbitrary laws are those which may be differently established, changed, or even abolished, without violating the spirit of the two primary laws, and without wounding the principles of the order of society."⁴

¹ Grot. *Dr. de la G.* l. 1, ch. 1, § 10.

² Zallinger, *Inst. Jur. Nat. et Eccles.* lib. 1, c. 2, § 8, 11; Reiffenstuel, *Jus Canon.* præm. § 14.

³ Zallinger, *ubi sup.* § 10; Suarez, *De Leg.* lib. 2, c. 13.

⁴ Domat, *Traité des Loix*, c. 11, § 1.

Grotius was somewhat misled by this idea of universality attached to natural law. He says that a thing may be proved to be of natural law in two ways,—either *a priori* or *a posteriori*. The first method is in substance that of Domat. It consists in showing the conformity or inconsistency of a given act with the reasonable and social nature of man. The second concludes that anything is of natural law, because it is held to be so among all nations, at least the most civilized. For as an universal effect presupposes an universal cause, such general consent of mankind can scarcely be attributed to anything but to what is called *common sense*.^p Without going so far as Hobbes, who argues that an appeal to the consent of mankind would require absolute unanimity, it must be admitted, that Pufendorf and Barbeyrac rightly reject this argument *a posteriori*, as unsafe and surrounded by a multitude of difficulties.^q Grotius has overloaded his pages with quotations and references, for the purpose of showing that consent.

Equally unsound is his position that there is a *jus gentium* or law of nations, which has acquired force by the consent of all nations, or at least of several.^r The consent of all is not to be found, as Pufendorf justly remarks.^s And indeed this voluntary *jus gentium*, distinct from natural law, is shown by Pufendorf and Barbeyrac to have no existence. For in the first place, the name of law cannot correctly be given to that, the obligation of which springs, not from the authority of a superior, but from consent; and as all independent nations are naturally equal, no one nation can impose a law on others, nor can they together prescribe laws to themselves.^t

The rights of ambassadors are placed by Grotius among the things which belong to this supposed customary law of nations. But the sacredness of these persons springs, as Pufendorf observes, from natural law, because it is necessary for procuring, preserving, and confirming peace among nations, and cannot without injustice be denied to persons employed for such purposes.^u And so it is with other things which have been attributed to this voluntary or arbitrary law of nations. They for the most part rest on natural law.

There are indeed certain arbitrary customs used among civilized nations. But if a sovereign think fit to give full and due notice that he does not intend to observe them, he can only be blamed at most for a want of courtesy and liberality, provided he do not violate any

^p Grot. Dr. de la G. l. 1, ch. 1, § 12.

^q Pufend. Droit de la Nat. et des Gens, l. 2, ch. 3, § 7.

^r Grot. Dr. de la G. ubi sup. § 14. And see l. 3, ch. 7, 9.

^s Pufend. ubi sup.

^t Pufend. Droit des Gens, l. 2, c. 3, § 23, and notes.

^u Grot. Dr. de la G. l. 2, ch. 18.

principle of natural law.* But it is no doubt best to observe those customs, and in general it would be a violation of natural law to disregard them without giving full and due notice to the other party. It is evident, however, that they cannot be considered as laws.

Pufendorf rightly embraces the doctrine of Hobbes on this subject, who divides natural law into the *natural law of men* and the *natural law of states*, which is the *law of nations*. "The precepts of both (adds the latter writer) are the same; but since states, when they are once instituted, assume the personal qualities of individual men, that law which, when speaking of individual men, we call the law of nature, is called the *law of nations* when applied to whole states, nations, or people."

It follows from this definition and the principles just laid down, that it is incorrect to speak of the agreements made in treaties among nations as part of the law of nations. Those agreements must be inviolably kept by virtue of a maxim of natural law which requires us to perform our promises; yet they cannot for that reason be called laws, except in an improper sense. And they no more constitute a branch of law than contracts among individuals, which are certainly not part of municipal law.²

Domat, as we have seen, adopts the *a priori* method of proving the immutable nature of laws,—that is to say, that of showing that they are natural laws. His system differs from that of other jurists in this respect, that he makes the two primary laws the test of all others, and holds that immutable or natural law is that which follows as a necessary consequence from those two fundamental laws, on which he has based his whole plan of human society.

And the same method is evidently applicable to every branch of public law. The obligation to obey powers is a consequence of the first law, because God has established them: and it is a consequence of the second law that we ought not to wrong any one, but ought to render to every man what is due to him. These rules are essential to the order of society, and they are therefore immutable or natural laws. And so it is with all the particular rules which are essential to the same order, and to the engagements which follow from the first laws. Thus it is a rule essential to the engagement of a guardian, that as he holds the place of a father to the orphan under his charge, he ought to watch over the conduct and property of that orphan, and this is an immutable law. Thus it is a rule essential to the engagement of a borrower in the contract of *commodatum*, that he ought to preserve the

* Pufend. Droit des Gens, l. 2, c. 3, § 23; Grot. Dr. de la G. l. 1, c. 1, § 14, n. 3, Barbeyrac; Wheaton, Elements of International Law, vol. i. p. 39.

¹ Pufend. ubi sup.

² Pufend. Droit des Gens, l. 2, c. 3, § 23.

borrowed property, and be answerable for any breach of that duty. These are immutable laws.^a

We must observe here, that the theologians consider man in two natures with reference to natural law. First, according to simple human nature, and the light of reason belonging to a reasonable mind; and secondly, according to the nature of grace, and the divine and supernatural light of faith by which he is governed in life. On these two principles they distinguish two sorts of natural law, one simply natural with respect to man, and the other, which though supernatural with regard to man, may be called natural as regards grace, because grace has its nature and essence and light, not only directing man to the due operation of that supernatural influence, but also dispelling errors touching the simply natural law, and prescribing its observance under a higher reason. Thus, as the simply natural law is divine because it emanates from God, so still more is the other branch divine. For the former is from God through the medium of nature, while the latter is from God infusing grace and a supernatural light.^b

Both these branches of law evidently spring from the two primary laws prescribing the love of God and of our neighbour; and this shows the connexion of theology with jurisprudence, and the harmony of those two sciences. The theological distinction just given is also important with reference to ecclesiastical jurisprudence. For though ecclesiastical law has for its object (as Suarez learnedly shows) the external acts of men, (according to the common maxim,—*Ecclesia non judicat de occultis*,)—yet it has for its ultimate object that which cannot be done without the more divine branch of natural law.^c It is a rule of civil conduct,—a rule to govern the actions of the citizens of that commonwealth of which it is the municipal law,—that is to say, the Church. And its final object is to direct those citizens to things beyond this life and world. So Reiffenstuel says that the canon law is constituted for these purposes: *ad recte vivendum, aternamque salutem consequendam, et justitiam in populo Christiano conservandam*.^d Consequently the canon law, though operating as a rule of external actions, must also have a reference to that Divine natural law which regards man according to grace and the light of faith.

Reiffenstuel says in the passage just referred to, *Jus canonicum est jus positivum*. But he means this only in the sense that it is as it

^a Domat, *Loix Civiles*, Traité des Loix, ch. 11, num. I.

^b Suarez, *De Leg.* lib. 1, cap. 3, § 2.

^c *Ibi*, lib. 4, cc. 12, 13; Decret. Gratian. Tract. de Pœnit. cc. 14, 31; Concil. Trident. sess. 24, De Reform. Matrim.

^d Lancelot, *Inst. Jur. Can.* lib. 1, tit. 1, § 1; Reiffenstuel, *Jus Can.* præm. § iii. 36—41.

were the municipal law of the Church, deriving its authority, in its form as municipal law, from the legislative authority in the Church. And it is evident that the doctrines of Domat respecting mutable and immutable laws apply to ecclesiastical law. This is another analogy between ecclesiastical and temporal laws.

But in ecclesiastical jurisprudence there are Divine positive laws, that is to say, those immediately enacted by the Divine will, and not necessary consequences of the two primary laws.* They are immutable so far as regards any human authority. And indeed they may be traced indirectly to the first of the two primary laws, because the love of God requires obedience to His laws.

Suarez argues that the necessity for these Divine positive laws is not absolute in order to their supernatural end, but as it were hypothetical, that is to say, necessary in consequence of a given fact, such as the existence of the Church. For though a supernatural law is necessary, that law which is of the nature of grace might have been sufficient. And the necessity of adding a Divine positive law arose from the institution of a mystical spiritual body, the Church. Subject to this modification the principles of St. Thomas Aquinas are applicable to this positive law.^f For St. Thomas says, that the Divine law is necessary for four purposes or reasons. The first is to direct man to a supernatural end. And we have seen that this is the ultimate object of ecclesiastical laws. The second reason is, that man may live even in this natural state so as not to do wrong. The third is, to regulate even his internal acts. And the fourth, to forbid all evil, which human law cannot do.^g

¶ The last of these reasons contains a profound thought, which furnishes a key to many difficulties regarding the relation of Divine to human laws. To understand it we need only reflect how vast are the consequences of the two primary laws, and how necessary those consequences are for the maintenance and welfare of human society; and yet human laws are manifestly insufficient to give them their full effect among men.

This shows the insufficiency of temporal governments even for the purpose of obtaining full benefit from the institutions of human society. We have seen that civil government is necessary to keep men within the order of their engagements. But even this can at best be done imperfectly by governments and laws. And still less can they make men fulfil all the obligations which the two primary laws prescribe. Yet as those two laws are the foundation of all the laws of man which

* Suarez, *De Leg.* lib. 1, cap. 3, § 14.

^f *Ibi*, § 16.

^g *Ibi*, § 15.

are the rules of his conduct directing him to his end,^b it is evident that the more completely they are fulfilled, not only in letter but in spirit, the happier will be human life and human society. And none of the direct consequences of those two primary laws (which are all natural immutable laws) can remain unfulfilled without injury to man.

Moreover we have seen that the general ties which God has formed to engage man in society, arise from the destination of all mankind to one end under the same laws; and they are therefore common to all the human race.^c But civil governments are confined to separate communities of men, and are therefore not co-extensive in their operation with those general ties. The scheme of society would consequently be imperfect without some system of a more extensive nature than civil governments. And jurisprudence would be incomplete as a system comprising all the laws whereby the conduct of man is to be regulated and directed towards his end. For only a small part of the immutable laws composing the body of natural law can be confirmed and enforced by municipal laws. Yet it would be absurd to say that any part of natural law is useless or to be neglected, because we cannot suppose that any Divine law is superfluous. All laws given by God concur to the same end, and are required for the economy of Divine government.

And so that branch of natural law regarding man according to grace and the light of faith, is not unnecessary even on earth; yet it is manifestly beyond the sphere of civil laws and polity. We have seen, as Suarez teaches, that this sort of natural law directs the interior man, dispels errors concerning the simple natural law, and prescribes its observance under a higher reason.^d It is a branch of the Divine law regulating and directing the interior acts of the soul, and their exterior manifestations, with reference to the rule of conduct shown by grace, and the light of faith. It belongs essentially to theology, because grace and faith are things purely spiritual;^e and if looked upon *objectively*, that is to say, in itself abstractedly, it is a matter exclusively theological. But if regarded *subjectively*, that is to say, in man as its subject, and with reference to acts internal and external, as a rule of conduct, it is a portion of universal jurisprudence.^f And here we see the impossibility of separating jurisprudence entirely from theology. So even a pagan juriconsult says, *Jurisprudentia est di-*

^b Domat, *Loix Civiles, Traité des Loix*, ch. 1, § 3.

^c *Ibi*, ch. 2, § 3.

^d Suarez, *De Leg. lib. 1*, ch. 3, § 2.

^e Devoti, *Inst. Canon. lib. 2*, tit. 2, § 2; Lancelot, *Inst. Jur. Can. lib. 2*, tit. 1, princip.

^f Zallinger, *Inst. Jur. Nat. et Eccles. lib. 5*; *Liber subsidiarius*, cap. 1, § 2.

vinarum atque humanarum rerum notitia; justi atque injusti scientia.^a But this is sufficiently pointed out by the first of the two primary laws, and the relation of man to, and his dependence on, his Creator, Governor and ultimate end.^b

These reflections on the vastness of the system of immutable laws, and the limited scope of municipal laws and government, lead to very important consequences with reference both to universal jurisprudence and to the practical part of Public Law.

Let us take a glance at the general plan of universal jurisprudence. In the first place the whole system springs from the two primary laws. Natural or immutable laws are direct consequences of those primary laws. And arbitrary laws derive their authority from the same source, because the obligation to obey powers springs from the two primary laws.

On those two laws depends the peace of human society, which St. Augustine beautifully describes as *ordinata imperandi obediendique concordia*, and the fruits of that peace to which the use of temporal things is referred in temporal society, which he calls *civitas terrena*.^c

Now the classification of laws, with reference to the authority from which they emanate, shows two great branches—human laws and Divine laws. Human laws are either temporal or ecclesiastical. The former have sole direct regard to the welfare of the *civitas terrena*—human society considered in itself. The latter are the laws of a mystical spiritual body, which, being composed of men, is partly temporal, but is distinct from civil society.

Divine laws, in like manner, have reference to human society considered as such, or to that mystical spiritual body the Church.^d Thus the Divine law, requiring us to obey powers of civil government, regards human society, while that which ordains the hierarchy of the Church belongs to a distinct separate society of men.

Many of those Divine laws are copied and enforced by human laws, as we shall see more fully when we come to consider the subject of arbitrary or mutable laws. And, again, many ecclesiastical laws are enforced by temporal laws. The reason of these double laws (both human and divine) is, that God has delegated his authority to human powers, that they may fulfil the objects which Divine Providence has committed to them. We have seen that government is required to keep every man within the order of the ties and engagements which bind him in human society for the fulfilment of the second of the two pri-

^a Ulpian, l. 10, ff. De Just. et Jur.

^b Zallinger, *Inst. Jur. Nat. et Eccles.* lib. 5, cap. 11, § 60, 63.

^c Div. August. De Civ. Dei, lib. 19, cap. 14.

^d Suarez, De Leg. lib. 1, cap. 3, § 16.

mary laws ; and, therefore, human powers must enforce the Divine laws by the power given to them, so far, at least, as those laws come within the scope of their commission.* This, indeed, as St. Augustine tells us in one of his finest passages, is absolutely essential to the existence of human society *falsum esse quod a quibusdam non recte sentientibus dici solet id esse jus quod ei qui plus potest utile est. Quocirca ubi non est vera justitia, juris consensu sociatus cætus hominum esse non potest, et ideo nec populus.*† And so Cicero says—*Non modo falsum esse istud sine injuria non posse, sed hoc verissimum sine summâ justitiâ reipublicam regi non posse.* And St. Thomas Aquinas tells us that human government is the more exalted in proportion as it is best ordained to the ultimate end of man,‡ which is that of the Divine law directing his conduct towards his end.

With regard to the other sort of double laws—those which are both temporal and ecclesiastical—their reasons depend on the relation between the functions of the two powers, temporal and spiritual, which ought to conjoin together for the good government of mankind, the one assisting the other.§

A careful meditation on this plan of universal jurisprudence shows that there is a great and necessary part of the system beyond the operation and scope of municipal laws and human government. In the first place, their direct object is confined to the temporal objects of that human society which St. Augustine calls *civitas terrena*. But man requires a further guidance, assistance and rule of conduct, because he has a reasonable soul,¶ and the end of his creation is beyond that terrestrial city. Consequently, the laws which are to govern man must belong not only to the terrestrial but also to the celestial city, and to the *civitas Dei*, which extends over both. The Divine law must, therefore, be far more vast in its operation than that law partly Divine and partly human, which is a rule of conduct to man solely with reference to the terrestrial city—that is to say, to human society and the use of temporal things.

* Prov. viii. 15 ; Wisd. vi. 4 ; Deut. xvii. 19 ; Rom. xiii. 4 ; Div. Thomas Aquin. Opuse. De Regim. Princip. cap. 8.

† Div. August. De Civ. Dei, lib. 19, c. 21.

‡ Div. Thomas Aquin. Opuse. De Regim. Princip. lib. 1, cap. 14,

§ Extrav. *Unam Sanctam*, De major et obedient. ; D'Aguesseau, Œuvres, tom. 1, p. 416 ; Domat, Loix Civiles, Traité des Loix, ch. 10.

¶ Sed ne ipso studio cognitionis propter humanæ mentis infirmitatem in pestem aliqujus erroris incurrat, opus habet magisterio divino, cui certus obtemperet, et adjutorio ut liber obtemperet. Et quoniam quamdiu est in isto mortali corpore, peregrinatur a Domino ; ambulat per fidem, non per speciem ; ac per hoc omnem pacem vel corporis vel animæ, vel simul corporis et animæ, refert ad illam pacem, quæ homini mortali est cum Deo immortali ; ut ei sit ordinata in fide sub æterna lege obedientia. Div. August. De Civ. Dei, lib. 19, cap. 14.

No part, however, of that Divine law can be a mere abstraction, for the whole of it is prescribed as a rule of conduct to man; and it is so interwoven together in all its parts that it forms one system which cannot be dismembered or divided, springing from the two primary laws.

It follows that there must be some system of government more extensive than civil governments, capable of preserving, teaching and giving effect to those laws which temporal powers are unable to enforce or can enforce but imperfectly.

Thus Domat holds Religion to be the most natural foundation of the order of society[†] among mankind, and we have seen that it cannot be separated from jurisprudence.

Savigny writes as follows :—"Public Law is also in contact with ecclesiastical law. Humanly speaking, the Church, considered as a community, a corporation, might belong to both public and private law, and be comprised within their domains. But its authority over the interior man rejects such an assimilation. History shows us that the Church and its law have at different times held a very different place in the State. Among the Romans the *jus sacrum* was part of the public law, and was regulated by the State. Christianity, by reason of its universality, cannot be subjected to a purely national direction or government."[‡] This remarkable passage shows how the Christian religion and the Catholic Church filled up a void in jurisprudence and government or polity which could not be filled by the Old Testament and the Jewish Church, because they had not the character of universality, but were given to a particular people, so that their legal nature was chiefly positive and municipal. Savigny says, that "ecclesiastical law is a special body of law independent both of public and of private municipal law."[§]

We must conclude that the Catholic Church and the laws of the Church belong to a system of public law invested with a wider unity than that of municipal law, public and private, and embracing the whole human race. Being a visible society composed of men, it must have a visible form and government;[¶] and it is also a mystical spiritual body, having not only unity on earth, but a unity with its invisible part belonging to what St. Augustine calls *civitas Dei*. Its laws are therefore universal, so far as they are essential and immutable.

[†] Domat, *Loix Civiles, Traité des Loix*, ch. 9, § 8.

[‡] Savigny, *Traité de Droit Roin.* tom. 1, pp. 26, 27, Paris, 1840. And see Mariana, *De Rege*, lib. 1, cap. 10.

[§] *Ibi*.

[¶] Devoti, *Inst. Jur. Canon. Prolegom.* cap. 1, § 5; Zallinger, *Inst. Jur. Natur. et Eccles.* lib. 5, cap. 1, § 316, 317.

Without this character of universality they could not be the complement of universal jurisprudence, because they would be municipal laws and of a restricted nature, and therefore inconsistent with the universality of Christianity. They would not be the universal sanction (*sanctio*) of the whole Divine law in all its branches; and that sanction can only be given by* a body partaking of the same universality, existing, as Savigny says, *beside the State* in each country, but revolving round a different centre from that of the political system of the State, because it belongs to a polity invested with a wider and an universal unity.

Many writers who attempt to solve the difficult problem of the relation between the temporal and spiritual powers, have neglected these important doctrines of Universal Public Law, because they consider the questions in dispute as belonging to municipal public law, or the constitutional law of each state. But that problem appertains to universal jurisprudence, and can only be understood by investigating the place which the laws of the Church hold as part of that science, and also the characteristics of unity and universality essential to the Church with reference to those laws and their administration, both interior and exterior.

CHAPTER VIII.

ON THE NATURE AND SPIRIT OF LAWS.—OF ARBITRARY OR POSITIVE LAWS, AND THE LEGISLATIVE POWER.

THE difference between immutable and arbitrary laws has already been briefly shown. But this subject requires full consideration. We have seen that immutable or natural laws affecting men are those derived from the two primary laws of which they are consequences. Thus the rules of equity mentioned by way of example in the last chapter, and other similar rules, are that which the spirit of the second law requires in each engagement.

The laws not essential to the two primary laws, and the engagements derived therefrom, are arbitrary laws. They may, therefore, be differently established, changed and even quite abolished, without violating the spirit and intent of the two fundamental or primary laws, and without injuring the principles of the order of society. Thus it is not material, with reference to the two primary laws, whether two

* Reiffenstuel, *Jus Canon. Univers. prom.* § 3, num. 36.

witnesses or three be required to a will or deed, or whether the form of government in a given country be a monarchy or a republic.

The first point which we have to consider is the human power to make laws.

St. Thomas Aquinas throws light on this subject.⁴ He argues as follows:—In all things ordained to a certain end, where they may proceed in one way or another, some direction is necessary whereby that end may be attained. Now man has an end to which all his life and actions are ordained, because he acts by understanding. St. Thomas then shows that it is according to man's nature, and indeed necessary to him, to be a sociable and politic animal; and as it is natural that man should live with many other men, so it is necessary that among men there should be something to govern that multitude, because if every man sought what he pleased, the body would be dissolved for want of some power to direct the members to the common good.

That power is what Grotius calls *the civil power*, which is the moral power of governing a community. It acts either in general affairs or regarding particular matters. General affairs are regulated by certain general rules called municipal laws.*

Suarez follows the same line of argument as St. Thomas;[†] and he draws the celebrated distinction between imperfect and perfect human societies. The imperfect is that of the family or domestic, and the perfect is the politic society. They are so called because the former cannot have within itself all that is requisite for the purposes of human society and life. The consequence of that imperfection is, that, *ex necessitate rei*, a more extensive community is required, that is to say, the politic society, which is called perfect because it is sufficient to itself, containing all those temporal things for which men are brought together by the Divine will, in the civil social state.

The second point is, that a perfect society or body politic requires a power by which it is governed; and as nature is not wanting in what is necessary, it follows, that since a perfect community is in accordance with reason and natural law, so must likewise be the power of governing, without which it would fall into confusion. The same reasons prove the existence of a due authority and subordination in the family or imperfect community.

The third point proved by Suarez is, that the human magistrate or civil power, if supreme in his order, has the authority to make civil or

⁴ Div. Thomas, De Regim. Princip. lib. 1, cap. 1.

* Grot. Droit de la G. l. 1, c. 3, § 6.

† Suarez, De Leg. lib. 3, cap. 1.

municipal laws. The reason is, that the civil magistrate being essential in the commonwealth, and the making of laws one of his most necessary functions, therefore the power to make laws must exist in the civil magistrate or government of civil society. For whoever receives an office, receives also the authority necessary for its exercise.^a

Such are the principal arguments of Public Law, by which the legislative power in civil society is shown to belong to that secondary natural law which springs from the institution of the social state.

We must now see the application of these principles to the ecclesiastical branch of Public Law. In the first place, the Catholic Church is a perfect body or society, because it has within itself everything necessary for the accomplishment of the end for which it was founded, and that end is that of man's existence.^b It follows that the Church must have the power which belongs to other perfect societies or bodies—to make laws for its internal regulation. Being a visible body, it must be governed by a visible power; and the functions of that power are analogous to those of other politic supreme powers.^c

Suarez refutes the error of those who deny the existence of a legislative authority in the Catholic Church. He asserts that there exists in the Church a peculiar power to regulate and govern. And this he proves with abundant authorities, both from the Scriptures and the writings of the Fathers.^d And he argues, that as the Church is a mystical body of Divine institution, therefore it must be constructed completely and in order, which would not be without a sufficient power to rule and govern it. Therefore, there is in the Church a Sovereign authority in spirituals. And that authority has the faculty of ordaining by general rules.

It is a true legislative authority. The principles already laid down prove this, as well as the character of the authority itself, for a perfect community or society cannot be governed without laws. The power of making general permanent rules of conduct is legislative, and those rules called canons are the laws of the Church.^e

Those who erroneously hold the Church to be an imperfect body, naturally infer that the Church has no legislative power, because, being within the State, it is for the State to make ecclesiastical as well as civil laws. The Chancellor D'Aguesseau holds that the Church is

^a L. 2, ff. De Jurisdic. l. 5, § ff. De offic. ejus cui mand. est Jurisdic.

^b Durand de Malliane, *Inst. du Droit Can.* tom. 1, pp. 52, 53; Suarez, *De Leg.* lib. 4, cap. 1, § 5; Vattel, *Droit des Gens*, liv. 1, ch. 2, § 14, 15.

^c Devoti, *Inst. Canon. Prolegom.* cap. 1, § 5; cap. 2, § 17.

^d Suarez, *De Leg.* lib. 4, cap. 1.

^e Devoti, *Inst. Canon. Prolegom.* cap. 3, § 25, 26.

within the State, and not the State within the Church.^m But that great magistrate wrote with the prejudices of a Minister of State. And the description which Grotius gives of the civil power does not agree with that opinion. It is true that Grotius speaks of a right of the civil power regarding the affairs of Religion, but he admits that it is a limited right and power.ⁿ And no doubt he is correct in this sense, that the State has power to restrain any religion manifestly contrary to morality and the welfare of society, which must be a false religion.^o And Barbeyrac, in a note to Pufendorf, observes that Religion was anterior to civil societies, and formed no part of their establishment.^p It follows, therefore, that even according to the opinion of these writers, there is a province in government exclusively belonging to the spiritual power, that is to say, the Church. Within this province they must admit that the Church is supreme, and therefore has power to make laws for its own government. The only question therefore is, as to the extent of that power; for if the Church were simply a body within the State, it would follow that the State would have an absolute unlimited power over it, as over other municipal bodies. And this would be at variance with the principles explained in the last chapter, which establish that both universal jurisprudence and civil government, considered as part of public law, would be incomplete without an ecclesiastical law and a church, both of them universal, and therefore separate from the civil laws and government, which are municipal.

This would suffice to show the error of Pufendorf and Febronius, who make the Church a college, or municipal corporate body politic. This is a correct description of local religious bodies contained within the limits of municipal law. But it cannot apply to the Universal Church, which, from its essential constitution, embraces all mankind, and is the same everywhere; its constitution being part, not of the municipal law of each or any country, but of Universal Public Law. To say that the Church is within the State is to say that the greater is contained by the less, or reduce the relation of the Church in a particular place with the remainder in other places, to a mere speculative unity—instead of a visible constitutional unity—consisting in an unbroken subordination of powers in regular progression under a general law, from the apex, or centre of unity, to the base of the pyramid.

^m D'Aguesseau, *Cœuvres*, tom. 1, p. 416.

ⁿ Grot. *Droit de la G.* liv. 1, ch. 3, § 6.

^o Noodt, *Dissert. de Religione ab Imperio Jure Gentium Libera*; Noodt, *Op.* tom. 1, p. 641.

^p Pufend. *Droit des Gens*, liv. 7, ch. 4, § 11, n. 2.

According to the principles of jurisprudence that is the only sort of unity of which the parts of a visible body politic,^a governed by visible means, are susceptible. The opinion of D'Aguesseau above referred to can only be received in this sense (in which probably he meant it), that with regard to double or mixed laws,—that is to say, laws both municipal and ecclesiastical,—the Church is considered as within the State by a sort of legal fiction, so far as the municipal laws affect it. And, indeed, the Chancellor explains his views of Church and State consistently with the famous Decretal *Unam Sanctam*,^c for he says that a king must serve God, not only as a man, but as a king; and that he should assist the authority and laws of the Church. D'Aguesseau, therefore, fully recognizes the distinction between the temporal and the spiritual powers even in exterior things.

Domat says that Religion and temporal government have their common foundation in the Divine order, and therefore they should assist and support each other; but yet, as they are different, God has separated the administration of the one from that of the other.^d

And herein he agrees with the canonists, who hold that the two powers—temporal and spiritual—are separate and distinct, having each a particular province in which it is supreme.^e This is the only doctrine on the matter in question that agrees with the principles of Ecclesiastical Public Law, on which the constitution of the Universal Church is constructed. For the universality and the unity of the Church are not abstractions, nor theological opinions, but practical visible realities of Ecclesiastical Public Law, because the Catholic Church is a real visible commonwealth, in the form of a monarchy, every part of which is united with the rest according to an uniform organic law. And the system extends beyond the State, and attaches itself therefore to an exterior point or centre of unity. Consequently the Church must necessarily have a self-governing power, separate and distinct from that which governs each state or nation.

The difference of the origin of the two powers is a further argument to show that they are separate and independent, though, for certain purposes, they conjoin together. The State comes from secondary natural law,^f being a consequence of the social condition of mankind,

^a It is *corpus ex distantibus*—as Pomponius says—*ut corpora plura non soluta sed uni nomini subjecta, veluti populus, legio, grex.* L. 30, ff. De Usurp. et Usucap. And see l. 1, § 3, ff. De Rei Vindicat. l. 23, § 5, ff. ibi; Instit. Tit. de Legat. § 18.

^c Extrav. *Unam Sanctam*, De major. et obedient.

^d Domat, *Loix Civiles*, Traité des Loix, ch. 10. And see Mariana, De Rege, lib. 1, cap. 10.

^e Devoti, Inst. Canon. Prolegom. cap. 1, § 6; Zallinger, Inst. Jur. Eccles. et Pub. lib. 5, cap. 6, § 365.

^f L. 5, ff. De Just. et Jur.

which natural law points out. And though the civil power be of Divine institution, yet Suarez shows the specific form of the civil power, or political power of government in each particular country, to be *juris humani*,* and therefore positive and mutable.

But the Church is of direct Divine institution.⁷ And being given for all mankind, and not (as civil governments are) for particular countries or nations, its constitution is substantially the same everywhere. It has that uniformity which we see in works of creation. And that constitution is of Divine institution in the form which its organic laws give to it.

It is impossible, even on mere legal principles, to deny that the two bodies politic thus described, with reference to their origin and general character, must be separate and distinct, and have separate powers of self-government.

The case is different where there is an established Church or religious body recognised and privileged by municipal laws, whose entire visible system is complete within the territory governed by the state or civil government. Such a body is legally municipal, even though it were a connection with or affinity to exterior bodies, provided they be not an essential part of its constitution. The Church is within the State and not the State within the Church. It has functions different from those of the civil magistrate, but there is no principle of public law to show that it must have a separate power of self-government. Its laws are municipal, and may be made by the legislative authority of the State, since they affect exclusively the subjects of the sovereign power in that particular country.⁸ Those laws ought not to violate the rights of conscience, and religious liberty of the members of the established religion; but this does not affect the principle that they are municipal laws forming part of the municipal legislation of the country. It only proves that, like other municipal laws, they ought not to be harsh or unjust. A religious body of this kind may, however, possess a subordinate power of making regulations in the nature of bye-laws with the concurrence of the civil magistrate, as is the case with the two convocations of the Anglican Church.⁹

Those laws which the Chancellor D'Aguesseau calls mixed, afford no argument against the doctrine of the separation and independence

* Suarez, De Leg. lib. 3, cap. 4, § 5; Covarruvias, Op. tom. 1, p. 189; Reiffenstuel, Jus Can. lib. 1, tit. 2, p. 62; Grot. Dr. de la G. lib. 1, ch. 3, § 6, 7; Pufend. Dr. des Gens, l. 7, ch. 3, § 2.

⁷ Devoti, Inst. Jur. Canon. Prolegom. cap. 1, § 3.

⁸ See the able summary of Hooker's views, given by the Right Hon. W. E. Gladstone, in "The State in its Relations with the Church," p. 7—9.

⁹ *Middleton v. Crofts*, 2 Atk. 605; Stra. 4056.

of the two powers within their respective provinces. For they are Ecclesiastical Laws which have received the sanction of the temporal legislator, or regulations made by the Church regarding certain temporal matters, viewed in their relation to spiritual things, and not otherwise.

Thus Domat says, "It may be thought that the spiritual powers have made regulations on temporal matters, such as are in the canon law, those which regard contracts, wills, prescriptions, crimes, the order of judicial proceedings, the rules of law, and other matters of like nature: and that we also see laws made by temporal powers in matters spiritual, such as some constitutions of the first Christian emperors, and ordinances of our princes touching matters of faith and of church discipline. But what is in the canon law relating to temporal matters cannot prove that the ecclesiastical powers regulate temporal concerns. It appears on the contrary, that at the beginning of the canon law,—where distinction is made between Divine laws and human laws,—it is said, that the human laws are the laws of princes, that it is by these laws that the rights to everything that man can possess are regulated, and that even the goods of the Church are preserved to it by the authority of those laws, because God has given to princes the ministry of the government in temporal things.^b Since therefore there can be nothing in the canon law which overturns this rule, it follows, that the rules which we see therein concerning temporal matters are capable of being reconciled with this principle. And this is not difficult if we reflect on the use that the rules relating to temporal affairs have in the canon law. For we shall find that, for example, the rules concerning the order in judicial proceedings relate to the ecclesiastical jurisdiction: that those about crimes establish the canonical punishments, that is to say, the punishments which the Church enjoins for the penance of criminals; that the rules which relate to contracts, wills, prescriptions, and the like, relate to them only in reference to spirituals,—as because of the prohibition of certain dealings to ecclesiastics, because of the religion of an oath, and because of the use of covenants for churches and particular ecclesiastics, and other similar views; that some of these rules are only answers of the Popes to consultations; and lastly, that whatever rules are there which relate purely to temporal things among laymen, ought to be considered only as rules binding the subjects of the territories of the

^b Distinc. 8. can. 1. Quo jure defendit villus ecclesie. Divino an humano? Divinum jus in scripturis Divinis habemus—humanum in legibus regum. Unde quisque possidet quod possidet? Non-ne jure humano? Jura autem humana jura imperatorum sunt: quare? Quia ipsa jura humana per imperatorem et rectores sæculi Deus distribuit humano generi.

See of Rome in which the Popes are temporal princes. And without those territories they have no other authority than what is given to them by the temporal sovereigns who receive the use of them among their subjects. Concerning which it may be observed, that these sort of constitutions in the canon law regarding temporal matters, show plainly enough that they are derived from temporal authority, seeing the greatest part of them have been taken out of the Roman Law, though it be true that some of them are contrary to it."

"As for the regulations which temporal princes may have made touching spiritual matters, they have not extended their authority to the spiritual ministry that is reserved to the ecclesiastical powers, but they have only employed their temporal authority to put the laws of the Church in execution in the external order of the government of the Church. And even those very ordinances which our kings call political laws are only to maintain the external policy of the Church, and to restrain those who disturb it by transgressing the ecclesiastical laws."

"And likewise it appears from the ordinances themselves, that the princes ordain nothing in them but what properly belongs to their temporal power, and call themselves therein the protectors, guardians and defenders of the faith, and executors of what the Church teaches and ordains."^e

This remarkable passage shows the nature of mixed laws. We may gather from it that they are of three sorts. The first are laws apparently mixed, because they are included in the canon law emanating from the Holy See, and regard temporal matters. But they are really temporal laws, for they were made by the popes as temporal princes for their own territory in Italy. The second are ecclesiastical laws touching temporal matters in their immediate relation to the Church. The third are laws of temporal princes regarding spiritual matters.

The second of these classes are evidently within the legislative authority of the Church, because as the Church is a visible society of men, and its functions and administration require the use of things of a temporal nature, it follows that the ecclesiastical laws must regulate and govern certain things, though in themselves temporal, so far as is requisite for the ends for which they are used to a spiritual purpose. And thus the acts of certain persons, though in their nature temporal, must in some instances be forbidden or regulated by the ecclesiastical law with reference to a spiritual object. Of all these things we have seen that Domat gives instances. As for the third class, they must be considered spiritual laws, to which the civil power only adds a temporal sanction and confirmation. The separation of the two powers is

^e Domat, *Loix Civiles, Traité des Loix*, ch. 10, § 11—13.

thus made more evident by examining mixed laws, wherein they at first sight seem blended together.

An explanation has already been given of the diversity between temporal and spiritual laws, with reference to the place which the Church and the law of the Church hold in the system of universal jurisprudence. Some further points in the same subject remain to be considered with regard to the distinction of the two legislative powers, temporal and spiritual.

Though those two sorts of laws resemble each other in all the features constituting the essentials of law, and though they have certain objects in common, yet both their matter and their spirit are different and distinct. For as the one law is temporal and the other spiritual, so the matter of the former is temporal and that of the latter spiritual. And it cannot be objected to this diversity, that both may command in matters relating to all the virtues. For, as Suarez shows, the immediate matter (*materia proxima*) of the law is the act itself, and that which it concerns or affects; and that may be either the thing or the person regarding which the act commanded or forbidden is done. But other things consequentially belong to the matter of the law by reason of the nature of the act. Thus the immediate and principal matter of the spiritual law is a supernatural act, such as an act of faith; and therefore all laws relating to faith are ecclesiastical, because their matter is entirely spiritual. So it is with respect to the acts of the sacraments. And thus acts, which in other respects are natural and human (such as matrimony, inasmuch as it is a human contract), belong to ecclesiastical law, because they are elevated into sacraments. It is the same with regard to other sacred acts, and those especially which belong or relate to Divine worship. And from thence the consequence has been drawn that the things which those actions relate to, immediately belong to the matter of the ecclesiastical law, as for instance sacred persons, places and churches, sacred vessels and utensils, and the like.

It follows also, that the wrongs contrary to the acts and things above referred to, belong also to the matter of canonical law which forbids them. And as all sinful acts are adverse to spiritual good and to the supernatural end of man, and are injuries against God, therefore they belong to the same order, and are the matter of ecclesiastical law, so far as it is useful to make laws regarding them.

Suarez remarks that this declaration of the matter of the canonical law shows that of the temporal or civil law. For that matter, fit for human law, which does not reach the degree of spiritual things, is temporal, in which are included proximately the moral acts necessary to human society, and mediately all the things to which those acts

relate, and also persons, inasmuch as the state or human polity (*civitas*) is composed of them.^d

Suarez gives, as a second difference between the two laws, that the spiritual law is more universal and of a more excellent nature. Of its universality we have already treated, in order to show that it is a necessary part of universal jurisprudence, though it stands, as it were, by the side of the municipal law in each state. We must here consider the other quality attributed to it by Suarez.

Cardinal Contarini, in his book on the Constitution of Venice,^e makes the following valuable reflections on the nature and spirit of municipal laws. He speaks of positive laws, or at least of laws considered as such, that is to say, as emanating from the human legislative authority.

"It has been much doubted whether the government of a city should be given to one man, to a few, or to a multitude. And it has, in my opinion, been most excellently and wisely held that the government of men should not be granted to one man, but that there must be something more divine to which the office of government should be given. And this may be seen clearly from the example of animals, which are not under the rule of one of their own nature, but of a far more excellent creature, that is to say, man. Therefore as the commonwealth is ordained for the government of its citizens in the use of the duties of life and of virtue; the highest reason shows that something more excellent than man ought to govern men, in order that those objects may be successfully attained.

"But as no creature in worldly affairs known to the senses is of a more excellent nature than man, and he is an animal constituted of different parts, being similar to beasts in the inferior impulses of his mind, and approaching a Divine nature in the superior powers of his soul, it is therefore right that that which in man is Divine should have the office of government. This office must therefore not be entrusted to a man, for he is often swayed and diverted from the paths of reason by the inferior forces of his mind; but it should be committed to the mind, pure and free from those perturbations. And for this reason, as that object could not otherwise be effected, it seems that by the invention of laws, mankind has by Divine council obtained this, that the office of governing commonwealths be committed to the mind and to reason free from passions. I know not whether this gift of God can be deemed inferior to any other, if the utility of laws be judiciously considered. For before they are ordained, many wise men assemble

^d Suarez, De Leg. lib. 4, cap. 11, § 6—8.

^e Della Repub. e Magistr. di Venetia del Card. Contarini, lib. 1, p. 22—24.

together, who, educated in the experience of many things, compare the inventions of others and the examples of past times, and after long consultation they decide that which they think best; nor are they turned by hatred, friendship or any other passion, because a private man has not an individual interest in the making of laws, as is the case in decisions on particular matters. When the laws are once established, if any man violate them and suffer the penalty which those laws command, he cannot reasonably feel aggrieved on that account against any one. And, therefore, there is not danger of seditions or strife in such cases. Whereas, if any one is punished by a judgment, not of the law but of men, serious discord and enmities are apt to arise, for we cannot help feeling ill-disposed towards any one who has done us any mischief. Therefore I know not whether nature, the mother of all things, ever gave to the human species anything greater than this invention of laws, which was by the ancients reasonably consecrated to the Gods. And Aristotle, prince of the philosophers, in that book which he wrote to King Alexander, found nothing resembling God, except the ancient law of a well-governed city. This is therefore the opinion of the great philosopher, that God is in the universe what that ancient law is in a civil community. And in the books wherein he treats of the republic, he says that the law is a mind without appetite, meaning that it is a mind pure, lucid, and unstained by any infirmity of passions. From these things, even a man of slow apprehension may see why it is most necessary that something more divine than man should rule and govern communities of men."

These profound observations of Contarini, whose wisdom had been matured in some of the highest offices in his republic, agree with the celebrated description of law by Papinian. *Lex est commune præceptum; virorum prudentum consultum; delictorum . . . coercitio; communis rei-publicæ sponsio.* And so Hooker says: "Even they which brook it worst that men should tell them their duties, when they are told the same by the law think very well and indifferently of it. For why? They presume that the law doth speak with all indifferency: that the law hath no onesided respect to their persons: that the law is as it were an oracle proceeding from wisdom and understanding. Howbeit that laws do not take their force from the quality of such as devise them, but from that power which doth give them strength of laws."¹

This important part of the spirit of municipal laws belongs also to the canonical laws considered in the light of municipal laws of the Church; but with this difference, that they are made for a super-

¹ L. 1, ff. De Legib.; Hooker, Eccles. Polit. b. 1, § 10. And Mariana says, "*Est enim lex ratio omni perturbatione vacua, a mente Divina hausta, honesta et salutaria præscribens, prohibensque contraria.*" De Rege, lib. 1, cap. 2.

natural end which must be universal, because it embraces all mankind, and has relation to a point of unity beyond human society. Consequently, their spirit must partake of the nature of that end even when they are purely positive laws, in the same way that the spirit of temporal laws belongs to the nature of their own end, which is that of the civil state.

This diversity of the spirit of the temporal and spiritual laws is a further proof that they are made by legislative powers separate and distinct from each other. They both spring from the two primary fundamental laws directly or indirectly, and yet they have distinct immediate ends,—the one considering man as a member of human society, and of a particular community of men, and the other regarding him as belonging to a commonwealth or body politic comprehending the whole world, and whose end is supernatural. This fundamental doctrine of Public Law, that the temporal and the spiritual powers are distinct and separate and independent of each other, is the only one that can solve the various problems which the relation between the Church and the State in different countries give rise to.

We have now shown the nature and origin of the legislative power in its two great branches, and the diversity of the laws springing from each. And by placing temporal and ecclesiastical laws as it were side by side, we have been enabled more fully to understand the spirit and characteristics of both. This will be an answer to those who may be surprised to find so much ecclesiastical matter in a legal treatise. A comprehensive method is indeed particularly necessary for the study of Public Law, which ought to include the system of all those rules, whatever be their origin, whereby human society is constructed and regulated, and mankind led, under Divine Providence, to the end for which they were created.

CHAPTER IX.

OF THE NATURE AND SPIRIT OF LAWS.—OF ARBITRARY OR POSITIVE LAWS.

THE nature and spirit of arbitrary or positive laws cannot be explained without a careful examination of their use in human society. We have seen that they are those which not being necessary consequences of the two primary laws on which society is founded, may be established, changed, and abolished, without injury to the principles of social order.

But though these laws are thus mutable,—for which reason they are called arbitrary or positive laws,—yet their arbitrary nature must be understood in a somewhat modified sense. For we have seen it laid down by Domat, that all the laws which regulate society, even in the state in which it is, (so strangely different from what the Divine law requires,) are consequences of the two primary fundamental laws.[†] His meaning is, that as human society is grounded on these two laws, the rules of conduct directing the actions of man therein must bear a relation to them, unless they be repugnant to the end of society. For as we see in the nature of man his destination to the accomplishment of the first law (which is very fully shown by St. Augustine),[‡] so we find therein his destination to society, and the several ties which engage him to it. And these ties, which are consequences of the destination of man to exercise the two primary laws, are also the foundation of the particular rules of all his duties, and the fountain of all laws. Municipal laws may be more or less calculated for the end which the lawgiver ought to have in view; but such is the nature which the Creator has given to man, that all municipal laws not contrary to that nature are consequences direct or indirect of the two primary laws. And thus Suarez lays it down, that all human laws are originally derived in some way or another from the Divine law, and he cites this fine passage of St. Augustine:—*Conditor legum temporalium, si vir bonus et sapiens est, legem æternam consulit, ut secundum ejus immutabiles regulas, quid sit pro tempore jubendum vetandumque discernat.* Reiffenstuel holds that all laws are derived from the eternal law.[§] And St. Thomas Aquinas says, that all human laws are derived from natural law.^{||} Some explanation is required to show the meaning of those great writers.

Suarez teaches, on the authority of St. Thomas Aquinas and others, that a human civil law is binding on the conscience of those who are subject to it; and he proves this by showing that the civil legislator makes laws as the minister of and by power received from God; that Divine and natural law require obedience to the laws of the civil authority; and that the power of making laws is necessary for the due government of human commonwealths.¹

These propositions have already been proved, and they lead to the conclusion that the authority of human positive laws is from the

† Domat, *Loix Civiles, Traité des Loix*, ch. 1, § 8.

‡ Div. August. *De Civitate Dei*, lib. 19.

§ Suarez, *De Leg.* lib. 1, cap. 3, § 17; Div. August. *De Vera Religione*, c. 31; Reiffenstuel, *Jus Canon.* præm. § 13.

|| Apud Suarez, *De Leg.* lib. 3, cap. 21, § 10.

¹ Suarez, *De Leg.* lib. 3, cap. 21, § 5—7.

natural and Divine law ; and, indeed, the first of the two fundamental laws evidently prescribes obedience to laws made by an authority which God has established for the government of man in civil society ; and the second as clearly requires submission to an institution so necessary and beneficial to the human race as civil municipal laws. But the writers cited above go a step further, for they teach that positive laws themselves are derived from the law of nature ; and Domat says, that they are consequences of the two fundamental primary laws. We shall see hereafter how this is so with regard to those positive laws which decide things left undecided by immutable law, but yet necessary to be settled for its practical operation ;^m and even purely arbitrary laws are rules of the society or social state to which God has destined man, and which is constructed on the foundation of the two primary laws ; and those arbitrary laws have or ought to have a sort of justice, consisting in their fitness and conveniency for the end of civil society. And even a purely arbitrary law must be a consequence, more or less remote, of the two fundamental primary laws, so far as it is fit and convenient for the purposes of civil society which is founded upon them. All laws, indeed, have the same ultimate end, which is that pointed out by the two primary laws ; and this will appear more clearly when we come to show how immutable and positive laws are combined together, and the relation which they bear to each other as classes forming that infinite detail of rules of civil conduct which we observe in every body of municipal legislation.

Hooker says, that merely human laws are those the matter of which is any thing that reason *but probably* teaches to be fit and convenient,ⁿ as contradistinguished from immutable laws, the justice and therefore the fitness of which can be demonstrated on principles of right reason. This observation is well worthy of consideration, as pointing out one of the characteristics of positive law, namely, the uncertainty of the principles on which it is constructed. There must be in every given state of circumstances requiring purely positive legislation, some possible law which is absolutely fit and convenient. Reason, however, *but probably* teaches what that law should be, and to discover this, in each case, is the problem to be solved by legislators. So we find great difference of opinion among honest men on matters of politics and public economy, but not on questions of justice and injustice—right and wrong.

These reflections show that the making of purely positive law belongs to the science of politics or government, which differs from public jurisprudence, inasmuch as the latter shows what is just and

^m Suarez, ubi sup. § 10.

ⁿ Hooker, Eccles. Polit. b. 1, § 10.

unjust or fit and unfit in the government of a state, while the former points out what is useful or advantageous.* Grotius thus draws that distinction :—"I have abstained from touching that which belongs to another subject, such as the rules of what is expedient. That is the province of another science—I mean *Politics*. Aristotle correctly treats that subject by itself, unmingled with any other, instead of which Bodinus often confounds it with the science of law." Barbeyrac observes on this passage, that though sound policy sanctions nothing but what is just, yet justice and utility are two separate things even in political affairs. Thus, to undertake war legally, there must be a just cause of war. Yet, however just the cause, it may be injurious to the state to engage in war, and to do so would be an error in politics.†

The difficulty of distinguishing between the sciences of politics and law by the test thus laid down consists in this :—There are many things in natural law that seem grounded on a principle of utility. Thus the two fundamental laws require many things of us, because they are beneficial to ourselves or others ; and the institution of civil society is shown to be of natural law by discovering its conformity with the nature of man rightly understood, and therefore its utility to him, and the will of the Creator that he should live therein. This is one of those institutions from which, as we have seen, the hypothetical or secondary natural law springs. They are deduced from the application of principles of right reason to the nature of man, showing that his nature requires them. Such is the institution of property, without which society must be dissolved in a general scramble for such things as are desirable, and the right of the strongest become the only rule ; or industry and frugality, the progress of art, agriculture, commerce and manufactures must be extinguished or arrested ; and thus the things of this earth would soon become insufficient for the wants of man, so that we should all be overwhelmed in one common barbarism and poverty ;‡ and many parts of the internal public law of states are of the same nature. Such is the sovereign power, in all its parts, which we have seen to be of natural law, because it is necessary for the subsistence of human society. And so we find Vattel summing up the duties of a nation towards itself, by saying that it ought to preserve and improve itself for the general welfare of the whole body politic and its members.¶ But all these things are necessary consequences of the two primary fundamental laws, and therefore, so far as they extend, they are matters of immutable law. They

* Lampredi, *Diritto Publ. Univ.* vol. 1, p. 34.

† Grot. *Dr. de la G. Disc. Prelim.* § 59 ; and see § 17.

‡ M'Culloch, *Princip. of Polit. Econ.* ch. 2, § 2, pp. 82, 90.

¶ Vattel, *Droit des Gens*, lib. 1, ch. 2, § 14.

are necessary to the order of human society: they are, consequently, not matter of choice, but of natural obligation, binding on men as the subjects of the Creator.

We may conclude, therefore, that even these things, which are shown to be of natural law by their fitness and necessity, are not binding merely because of their use, but as necessary consequences of the two fundamental laws. And from them flows the vast body of secondary natural law, the rules of which are included in the general description of justice by Ulpian—*Justitia est constans et perpetua voluntas suum cuique tribuendi*.⁸ And when Cicero says, *eadem utilitatis quæ honestatis est regula*,¹ he means, as the context shows, that justice and morality are the only sound test of utility, contrary to the doctrine of the Epicureans, who make utility the first principle and rule of justice and morality.² The Roman jurisconsulti, in the Pandects, do not confound justice with utility. And the Christian Religion has put an end to the utilitarian theory.

We may deduce from all these authorities and reflections, that purely arbitrary laws bear some relation to the two primary laws, and that they are grounded on certain principles of fitness and convenience, with reference to the purposes of civil society and the general objects of all human laws. But there may be laws unfit for, or repugnant to those purposes and objects; and their authority rests solely on the principle that obedience to the civil power is necessary for the maintenance of society, and therefore part of the natural or immutable law.

Thus the authority of all municipal laws is derived from natural law. And in a perfect system of municipal laws, even the most purely positive and arbitrary would be a more or less remote consequence of some part of the rules flowing from the two primary fundamental laws, and would have a sort of justice arising from its relation to the order and welfare of society.

⁸ L. 10, ff. De Just. et Jur.

¹ Cicero, De Offic. lib. 3, c. 8.

² Cujacius, Op. tom. 7, col. 48, ad L. 9, ff. De Just. et Jur.

CHAPTER X.

THE NATURE AND SPIRIT OF LAWS.—OF ARBITRARY OR
POSITIVE LAWS.

PERHAPS it may be argued, with some apparent show of reason, that immutable laws, that is to say natural laws, should be sufficient for the purposes of mankind, because no others are necessary consequences of the two primary laws on which the order of society is founded. But as we see in the whole economy of the world, that some things are given to man, while others are left to be devised by his invention and executed by his skill, so it is with laws also. And the arguments by which we have shown that the legislative power in the Church and in the State is of natural law, prove the authority to make human laws, not only in confirmation of the law of nature, but also positive or purely human. And as God himself has given Divine positive laws besides the purely Divine Law,* so He has left to the ecclesiastical and civil governments of mankind, that is to say, the Church and sovereign states or kingdoms, power to add human positive laws beside the law of nature, and not contrary thereto. Thus a great canonist says:—*Queritur quid sit jus humanum? Est jus quod homines a Deo accepta potestate condiderunt ac promulgarunt: sive quod obligandi vim immediate obtinet a libera voluntate hominis publica autoritate aliquid præcipientis vel prohibentis.*† And the same writer thus gives a general definition of positive law. *Jus positivum ita dicitur quod ultra ea quæ jus naturale præcipit, prohibet, vel permittit, aliquid ponat: estque illud quod procedit ac pendet a libera voluntate superioris, scilicet Dei vel hominis, aliquid præcipientis, prohibentis vel permittentis.*‡ These definitions imply a mutable addition or supplement to immutable laws; something commanded or forbidden, beyond what is commanded or forbidden by immutable law. But all this will appear clearly by examining the nature and uses of positive laws.

Two general causes have rendered necessary the use of positive laws in human society, and are the source of that infinite variety of such laws which we see in the world.

* Devoti, Instit. Canon. Prolegom. § 31; Schmalzgrueber, Jus Canon. Univers. Dissert. præm. § 3.

† Schmalzgrueber, Jus Canon. Univers. Dissert. præm. § 4, num. 112.

‡ Ibi, § 3, num. 86.

St. Thomas Aquinas observes that there are two modes whereby a law may be deduced from natural law. One is by way of conclusion from a general principle of natural law, and the other is by way of determination (*per modum determinationis*), because the law of nature commands something generally, as for instance, that imposts are to be paid and crimes punished. And from that general precept it follows that the amount of the impost and the specific nature of punishments must be determined by the human legislator, by the power which God has given to him.^a This is the first cause of positive laws. It is, as Domat tells us, the necessity of regulating certain difficulties arising in the application of immutable laws, where the difficulty is such that it can only be provided for by a law, and yet no immutable law regulates it.^b A few examples will show the nature of these difficulties and of this sort of arbitrary laws.

It is an immutable law (belonging to secondary natural law), that whoever is the absolute owner of anything should remain so until he voluntarily divests himself of his property, or it is alienated from him by some just and lawful means.^c And it is another immutable law that possessors should not be always in danger of being disturbed, and that he who has possessed for a long time should be held to be the owner, because men are naturally careful not to give up what belongs to them, and no one should, without proof, be presumed an usurper.^d

If, as Domat observes, the first of these laws be too much extended, which requires that no one be deprived of his property except by a good title, it will follow, that whoever can show that he or those through whom he claims have been owners of the property, though for more than a century they have been out of possession, will recover it from the possessor, unless the latter can prove a good title which divested the right of the original owner. If, on the contrary, the rule which presumes possessors to be owners be too far extended, all those who are not in possession will be unjustly deprived of their property.

It is evident, continues Domat, that the conflict which would be produced by these two laws, one of which would reinstate the former owner to the prejudice of the old possessor, while the other would maintain the new possessor against the true proprietor, requires regulation by an arbitrary law, that those who are not possessors, but claim as owners, be required to prove their right within a certain time; and that after the lapse of such time possessors who have not been disturbed be maintained. And this has been done by arbitrary laws,

^a Suarez, De Leg. lib. 3, cap. 21, § 10.

^b Domat, Loix Civiles, Traité des Loix, cap. 11, § 6.

^c L. 11, ff. De Reg. Jur.; Petri Fabri Comment. ad Tit. De Reg. Jur. ad l. 11.

^d Fæbeus, De Reg. Jur. Canon. tit. 3, reg. 2, pp. 45, 46.

which regulate the time required for prescription and limitation of actions.*

Those laws form an important part of the jurisprudence of all countries, and constitute one of the broadest and most important institutions of the civil law.^f Thus usucapion operates as a mode of acquisition by the civil law as contradistinguished from the *jus gentium*: and it is neatly defined by Modestinus to be *Adjectio dominii per continuationem possessionis temporis lege definiti*.^g

Another feature of this branch of arbitrary law is the distinction between usucapion or acquisition by possession and prescription, which consists in the loss of a right of action or legal remedy by the uninterrupted silence of him who was entitled to it.^h They were practically blended together by Justinian, but still the distinction exists.ⁱ

So in the English law there is this same prescription, or title acquired by use and time, and defined to be *titulus ex usu et tempore substantiam capiens ab auctoritate legis*.^k And we have the limitations of actions by divers statutes,^l which establish titles by the extinction of adverse rights of action. These distinctions are mentioned here for the purpose of showing how a great deal of arbitrary law is generated by the use of the class of immutable laws described above. It occurs thus: the operation of one or more immutable laws must be defined by some arbitrary rule, and from that rule a number of deductions and distinctions, more or less logical, are drawn for the purpose of meeting different cases. And thus divers branches of arbitrary law have been created.

The law of prescription will enable us to show how the principles of Domat are to be considered with reference to international law.

Grotius, according to Savigny, lays down dereliction or abandonment as the basis of prescription.^m In some cases there may be a real abandonment of the property by the original owner. But there the possessor acquires the property *jure gentium*, and not by positive law;ⁿ and, as Savigny points out,^o that abandonment would, if taken as a

* Domat, *Loix Civiles*, *Traité des Loix*, ch. 11, § 8; Savigny, *Traité du Droit Rom.* tom. 4, pp. 316—319, edit. Paris, 1845.

^f Savigny, *ibi*, p. 310.

^g Vinnii Comment. ad Inst. l. 2, tit. 6, princip.; l. 3, ff. De Usurp. et Usucap. See the observations of Savigny, *ubi sup.* p. 319, &c., cap. 3, § 178, 6.

^h Savigny, *ibi*, p. 308, 309.

ⁱ Vinnii Com. *ibi*.

^k Co. Litt. 113; *ibi*, 114; 4 Rep. 32.

^l Co. Litt. 115.

^m Grot. *Droit de la G.* l. 2, ch. 4.

ⁿ Inst. Justin. lib. 2, tit. 1, § 16.

^o Savigny, *Traité du Droit Rom.* tom. 4, pp. 318, 319.

general principle, rest on a presumption of law founded on a supposition, in most cases purely arbitrary and fictitious. Grotius, indeed, states the correct doctrine that prescription is a creature of municipal law. And he says, that Vasquez is therefore of opinion that prescription cannot take place between sovereign states. But he argues that this opinion would, if admitted, cause great inconvenience, for there would be no end to disputes about kingdoms and their territories. And then, according to his system, he gives a number of instances to show that prescription is part of the law of nations by the common sense of mankind. And he thinks that there are grounds for holding that immemorial uninterrupted possession gives the right of ownership or dominion, by virtue of the arbitrary law of nations, arising from the common consent of nations.^p But I have already shown, as Barbeyrac, the learned annotator of Grotius and Pufendorf, points out, that this arbitrary law of nations, springing solely from general consent, does not exist. And Grotius himself, referring acquisition by long possession among nations to the abandonment of the original rights of ownership by dereliction, and to the importance of preventing interminable disputes,^q shows that the supposed arbitrary law of nations is here unnecessary. This is rendered clear by the doctrine of Domat given above, that there is a principle of natural law in the law of prescription, although in its form, as a positive institution, it belongs to arbitrary law; and Cujacius goes so far as to hold, that usucapion is for the public good, but contrary to natural equity.^r

Pufendorf explains this subject very well, by saying that as the institution of property has been introduced for the peace of mankind, it follows that, after a certain time, *bonâ fide* possessors ought to have an incontestable right to what they hold, and thus prescription in itself, separate from the precise time limited by law, is a dependance and a consequence of the institution of property. It follows that even among those who have no law in common but natural law and the law of nations, possession acquired in good faith, and preserved without interruption for a long time, is a good title. And this is the more reasonable, because much greater evil arises from the disturbance of the possession of a sovereign than in the case of a private person. Pufendorf however observes, that in disputes between sovereigns, it is often superfluous to rely on prescription, because the possessor can and ought to found his right on a more solid title.^s

All these reflections show the true foundations of those parts of the

^p Grot. *Droit de la G.* liv. 2, ch. 4, § 1, 9.

^q *Ibi*, § 3—5.

^r Cujac. *ad l. 1, ff. De Usurp. et Usucap.*; Cujac. *Op. tom. 1, col. 963, ed. Venet.*

^s Pufend. *Dr. des Gens*, liv. 4, ch. 12, § 9, 11.

law of nations which have been erroneously referred to custom, constituting an arbitrary law of nations, but are matter of natural law, to which usage has only given a form. And thus Wheaton appeals to the constant and approved practice of nations, in support of international prescription, because such is the form that it has acquired.⁴ And thus the rights of ambassadors have been supposed to rest on custom, whereas they derive only their form from custom, which defines rules of natural law, as the sort of arbitrary laws, above explained by Domat, define immutable laws which are of their own nature general and indefinite. This analogy is very important, for it shows the true legal nature of these customs. They are not absolutely binding as law, except so far as the rules of natural law extend, though it is exceedingly convenient and desirable to follow scrupulously all usages received among civilized nations." And no material part of them should be deviated from, without sufficient notice to the other party.

The law of prescription has given us a view of the class of arbitrary laws now under consideration. But some further illustration of the subject will be useful.

"It is an immutable law," says Domat, "that persons who have not yet sufficient use of their reason, for want of age, knowledge and experience, should not have the management of their property and affairs, and that after they acquire those qualifications, they should have such management. But as nature does not give to all, at the same age, the full reason required for that purpose, the use of this law has rendered necessary that of an arbitrary law making a rule for all cases. Thus the laws of some countries have left to fathers the power to decide to what age their children shall be under the guidance of a guardian, while others have determined the age below which persons are in the state called minority, after the expiration of which they reach that of majority."⁵ The justice of an arbitrary law determining the age of majority must consist in its adopting a fair medium and establishing a rule which will be correct in the greater number of cases. To these sort of laws those texts in the Pandects apply which say that laws should be made for cases which commonly occur. *Nam ad ea potius debet aptari jus, quæ et frequenter, et facile, quam quæ perraro eveniunt.*⁶

The doctrines explained above are applicable to ecclesiastical as

⁴ Wheaton, Elements of International Law, p. 206.

⁵ Puffend. Droit des Gens, l. 2, c. 3, § 23; Grot. Dr. de la G. l. 1, ch. 1, § 14, note 3, Barbeyrac; Wheaton, Elements of International Law, vol. 1, p. 39.

⁶ Domat, Loix Civiles, Traité des Loix, ch. 11, § 9.

⁷ L. 5, ff. De Legib.; and see l. 3, 4, 6; l. 64, ff. De Reg. Jur.

well as to temporal laws. But an example from the canon law must not be omitted. It is an immutable law that benefices should not be left vacant to the prejudice of divine service. And it is also an immutable law that patrons entrusted by the church with the *jus patronatus* should not exercise it in a hurry, but should be careful to seek fit persons for promotion. To reconcile these two natural laws, giving to each its proper effect, an arbitrary law is required, determining within what time vacant benefices shall be filled. And, therefore, the Third Council of Lateran provided that benefices shall be filled within six months: and Pope Innocent III. declared that archbishoprics and bishoprics should be filled within three months.* And after the lapse of the time limited, the right of patronage devolves on the next immediate superior. For the principles of the canon law do not permit the service of the Church, and the welfare of the people, to suffer from the omission of any one to do his duty, and therefore a remedy is supplied to the neglect of patrons and prelates, by the law of devolution or lapse.

It is necessary to observe in all these and similar examples of arbitrary laws consequences of immutable laws, that each of those arbitrary laws has two characters which must be seen and distinguished one from the other, and which make them as it were two laws in one. For a part of that which they prescribe is of natural law, and the remainder is arbitrary. Thus the law determining the age of minority contains two dispositions. One provides, that persons incompetent for want of maturity and experience, shall not be entrusted with power which they would use in a manner dangerous to themselves and their families, and the interests of society; and the other limits the age of minority. So a law establishing some tax or impost contains in like manner two dispositions. One requires the payment of those supplies without which civil government and society cannot be supported,^a and the other determines the particular amount required, and the sources from whence it is to be raised. The same distinction is to be observed in criminal laws establishing punishments of acts forbidden by immutable laws. In each of these examples of double laws, the first is an immutable, and the second is an arbitrary or positive law.

We have now sufficiently considered the first cause of arbitrary laws. The second cause consists in the invention of certain artificial arbitrary institutions which have been thought beneficial to society.

* Van Espen, *Jus Eccles.* tom. 3, pp. 105, 106; Decretals, lib. 1, tit. 10, c. 3; Schmalzgrueber, *Jus Eccles.* tom. 1, pars 2, p. 421.

^a Suarez, *De Leg.* lib. 3, cap. 21, § 10, A. p. 289; Grotius, *Dr. de la G.* l. 1, c. 3, § 6, and l. 1, c. 1, § 6; Pufend. *Droit de la Nat. et des Gens*, l. 7, c. 4, § 7; Zallinger, *Inst. Jur. Nat. et Eccles. Pub.* tom. 1, lib. 3, cap. 7.

Such are feudal tenures, entails, settlements, and various professions and trades. Of the same nature are different forms of government and political institutions,—as republics, kingdoms, parliaments, senates, and other assemblies of various forms and sorts. And in ecclesiastical law we may give as instances various bodies, offices, and dignities,—such as chapters, regular orders, confraternities, prebends, deaneries, and the like. These are part of the polity or constitution of the Church, but they have been invented, altered, and in some instances abolished, according as circumstances required, by the Supreme Ecclesiastical Authority. And even international law has to deal with institutions of this sort, established by treaty, as well as with some of those referred to above. Such are factories, free ports, and other establishments for foreign trade, fortified places, and the like. These things, though they have certain relations with international law, are arbitrary matters regulated by municipal law.

All these various institutions and matters are regulated by a vast detail of laws of the same nature as themselves. Thus we see in human society, as Domat remarks, the use of two sorts of matters. For there are some so natural and essential to the most common wants, that they have always been more or less in use everywhere, and seem pointed out by nature. Such are exchange, letting and hiring, deposit, loans, and divers other contracts, wardships, successions, and other things.^c And we also find the use of invented artificial things. But even these have their foundation in some principle of the order of society. Thus the feudal system was founded not only on the freedom of men to make agreements, but on the public advantage of securing the defence of the kingdom. So settlements are intended to secure the maintenance of families. And again, different forms of civil polity, parliaments and councils, are intended for the good government and peace of the community to which they belong.

Domat observes, that though it may seem that these artificial matters should be regulated solely by arbitrary laws, they notwithstanding have several immutable laws. And on the other hand, the matters which may be called natural, are governed not only by natural and immutable laws, but also by arbitrary laws. Thus in the feudal system it is an immutable law, that the conditions on which the land was granted ought to be faithfully observed by the tenant. Thus in the matter of guardianships, which is natural, the precise mode in which the guardian is to pass his accounts, and the authority to which he is amenable, are determined by arbitrary laws. These examples suffice

^c L. 5, ff. De Just. et Jur.

to show that in all matters, natural or artificial, immutable and arbitrary laws are mingled together. But in natural matters there are few arbitrary laws, of which there is an infinite number in those other matters which have been artificially invented.⁴

Arbitrary laws then are of two sorts, according to the two causes which established them. The first consists of arbitrary laws which are consequences of natural laws, (as, for instance, those which define the age of majority and the limitation of actions), and the second is of those invented to regulate arbitrary matters, such as the law of entail, and of remainders and settlements.⁵

The characteristics of the justice and authority of natural and arbitrary laws appear from the distinction between them, and from the reflections already made on both. And as laws derive from their justice and their authority the power which they ought to have over our reason, it is important to consider and distinguish what is the justice and authority of natural laws, and what the justice and authority of arbitrary laws.

The former being essential to the two primary fundamental laws and the engagements arising from them, they are just in every place and at all times. But the latter are not essential to those foundations of the order of society, and therefore they may be altered or abolished without injuring it, and the justice of those laws consists (as we have shown in the preceding chapter) in the particular utility of establishing them.

The universal authority of all laws consists in the Divine order which subjects men to their observance; but there is a difference between the authority of the two classes of laws which we are comparing. Natural laws have the natural authority of justice over our reason; but as some men have not the capacity to see them clearly, or the rectitude to obey them, the authority of temporal powers gives to them another force independent of the approbation of men, compelling obedience to their precepts. On the other hand, the authority of arbitrary laws consists only in the force given to them by those who have power to make laws, and the ordinance of God commanding obedience to temporal government.

This difference between the justice and authority of natural laws, and that of arbitrary laws, leads to the conclusion that the former being naturally known to man by the use of reason, are obligatory without any publication, but the latter take effect only from the time of their promulgation.⁶

⁴ Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 11–16.

⁵ *Ibi*, § 17.

⁶ *Ibi*, § 20.

Though natural or immutable laws are essentially just and cannot be changed, it does not follow that they are subject to no exception. Suarez explains this proposition thus : natural laws require no dispensations or equitable construction in the nature of a dispensation, because they contain an intrinsic principle of justice and morality ; or because the precepts of this law are necessary propositions, which are inferred from natural principles, and those propositions cannot in any particular instance fail or be false.² Thus Domat says, that as laws derive their justice and authority from their relation to the order of society and the spirit of the two first laws, it follows that when that order and spirit require exceptions to general rules, those exceptions must take place ; but, nevertheless, those natural laws are immutable, though the exceptions make them less general than those which are subject to no exceptions, such as the law which forbids fraud, and commands good faith and fidelity to lawful engagements. The exceptions have their foundation in the spirit of the laws, and they are themselves other laws which do not alter the nature of those to which they are exceptions. Thus the laws are in harmony and agree among themselves by common spirit, which constitutes the justice of all. For the justice of each law is limited within its boundaries, and no one extends to what is otherwise regulated by another law. Thus laws subject to exceptions, must be considered as general rules applying to what occurs commonly ; and those which make exceptions as particular rules for certain cases ; but both are laws and rules equally just, according to their use and extent.³

Suarez observes that his proposition cited above does not apply to natural laws in the form of positive laws, that is to say, municipal laws giving a sanction to natural laws. For they must be construed according to the language and intention of the legislator ; and therefore cases may occur where they are unjust, and a dispensing power may be required, though the law taken *per se*, as a natural law, would always be just.⁴

Those who neglect the distinctions between different sorts of laws, which I have endeavoured to explain, fall into the error of confounding all laws together under the one head of positive laws. For the authority of those laws is more striking and obvious than principles of reason and justice, because they are published by the temporal power of the state, and enforced as a rule of conduct on the citizens. But this error renders it impossible to understand the nature and spirit of laws, a necessary and fundamental part of jurisprudence in all its

² Suarez, De Leg. lib. 2, cap. 16, § 3.

³ Domat, ubi sup. § 20, 22.

⁴ Suarez, De Leg. lib. 2, cap. 16, § 16.

branches. And those distinctions are especially indispensable for the science of Universal Public Law. It contains such a vast multiplicity of laws, having such various objects according to the branch of Public Law to which they belong, that no one can obtain any clear notion of the whole, or of its details, without accurately distinguishing one sort of law from another, and so seeing the distinctions which run through the whole science and simplify the system. Public Law has for its principal subject, not the relations of individuals but aggregates of men, and the relations of men to such politic bodies. It looks on natural persons in a secondary point of view, in their relation to the Church or the State, and on States both in themselves and in reference to each other.¹ And the harmony of the system on which mankind are governed under Divine Providence requires that there should be certain common principles on which the laws of that government are constructed. I have shown that they are all derived in one way or another from the two fundamental laws. And the distinctions which I have explained, between the different sorts of laws, arise from their different relations to those two laws on which the whole scheme of human society is constructed by means of various ties and engagements. This would suffice to show what use is to be derived, as to Universal Public Law, from the knowledge of those distinctions, and the nature and spirit of laws.

These reflections include Ecclesiastical Law, because there is a certain analogy between the Church and the civil commonwealth;² and the canon law is a rule of civil conduct, to direct the citizens of the monarchy, of which it is the law, that is to say, the Church.³ The immediate objects of the two laws, temporal and spiritual, are different,⁴ but both may be traced to and hang from the two great fundamental laws laid down in the Gospel, from which we have obtained the doctrines and distinctions already expounded.

¹ Savigny, *Traité du Droit Rom.* tom. 1, p. 22; l. 1, ff. *De Just. et Jur.*; l. 2, ff. *De Orig. Jur.* § 46.

² Devoti, *Inst. Canon. Prolegom.* cap. 1, § 5, 6.

³ Lancelot, *Inst. Jur. Canon.* lib. 1, tit. 1, § 1; Reiffenstuel, *Jus Canon.* præm. § 3.

⁴ Zallinger, *Inst. Jur. Nat. et Eccles. Pub.* tom. 1, lib. 3, cap. 6, p. 450.

CHAPTER XI.

ON THE NATURE AND SPIRIT OF LAWS.—REFLECTIONS ON THE SCIENTIFIC USE AND DIVERSITIES OF NATURAL AND ARBITRARY LAWS.

DOMAT dwells much on the importance of knowing the nature and spirit of laws for the purpose of applying them. And this is most necessary for the use of the Roman Law as written reason in every branch of the science of jurisprudence, but especially in ecclesiastical, international, and municipal private law. The great French civilian gives the following example to show the difficulty of distinguishing natural from arbitrary laws.

A celebrated law of Papinian, in the Pandects, decides that pupillary substitution excludes the legitim of the mother.*

By the Roman Law, no one can make a will who is under the age of puberty. But the father can make a will for his son under that age, by what is called pupillary substitution, that is to say, by substituting some one in the place of the son as heir, in the event of the son dying in pupillage, that is to say, before puberty. Now the decision of Papinian is, that if that power be exercised, and the son die before puberty so as to let in the substitute, the mother loses her legitim, though the son could not by *his* will deprive her of it. The reason of Papinian is, that it is the father who takes away the legitim (by giving the estate to the substituted heir) and not the son, and the father has the power to do so, though the son has not. Domat observes, that the difficulty arose in this case from the apparent conflict between a natural law and an arbitrary law. And the decision prefers to the natural law which gives to the mother the right of succeeding to her son's estate, the arbitrary law which permits the father to substitute, extending that power so far as to give the property to the substitute, and deprive the mother of her legitim. It was so decided, according to the spirit of the old Roman Law, which favoured the power of testators, and even allowed a father to disinherit his children without any reason. And, according to that spirit, the subtilty was invented of holding that the substitution being the act of the father, it was he who disinherited his wife, and not the son who disinherited his mother. But it is clear, that according to the principles of natural law, the mother should not be disinherited. The property belonged not to the father but to the son; and the father

* L. 8, § 5, ff. De inoffic. Testam.

being entrusted with the power of making a will for his son by pupillary substitution, should not be allowed to do with the son's property what the son ought not to do himself.⁷ Therefore this is a technicality of the Roman Law which ought not to be followed, except where that part of the Roman law is received. It is not written reason.

Domat observes, that as it is important not to injure natural equity by technicalities and false consequences drawn from arbitrary laws, so on the other hand care must be taken not to extend a natural law beyond the limits assigned to it by an arbitrary law which puts it in harmony with another natural law, and gives to both their proper effect. Thus it is a natural law, that he who does any damage to another should repair it. But if that law be so extended as to oblige a debtor, who has not paid at the time when the debt was due and payable, to repair all the loss or damage which the creditor has suffered by the default,—as for instance, if his goods have been taken in execution, or his house has fallen down for want of the money,—that application of the law would be unjust. For it would wound an arbitrary law which provides that a debtor, who does not pay a debt which is due, shall be obliged to compensate the creditor by the payment of interest at a certain rate or per centage, and restricts the compensation for default of payment to such interest. And thereby two natural laws would be violated. One forbids that men be made liable for unforeseen events, which are rather the act of God or fortuitous occurrences than anything that can be reasonably imputed to them. And the other requires that the infinite variety of injury which creditors suffer by delay of payment, be reduced within some general rule to an uniform compensation, because not only that variety is caused by the difference of accidental circumstances for which no one should be answerable, but it would give rise to an endless and mischievous multiplication of litigation.⁸

Here again we see an example of the use of arbitrary laws, and this shows that there are difficulties which require to be regulated by that sort of laws. But Domat points out that there are in the science of jurisprudence an infinite variety of other difficulties which cannot be solved by any precise rules, and which require especially a complete knowledge of natural laws. Those laws, though they are naturally taught by reason, are both more difficult and more important to be known than arbitrary laws. And there are two reasons which make a complete study of them necessary.

The first is that natural rules are exceedingly numerous, and on ac-

⁷ Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 24.

⁸ Domat, *Traité de Loix*, liv. 1, tit. 2, § 2, art. 18.

count of their multitude and diversity they are not evident to all men ; and reason alone does not suffice to find them and apply them to all cases. And the second reason is, that these laws are the foundation of the whole science of law.

And with regard to the study of natural laws, Domat observes, that they are of two sorts. One consists of those which convince the mind without any reasoning, by their evident truth. Such are the rules that agreements are in the place of laws among those who are parties to them, and that he who has received a deposit must restore it. And the other sort consists of those rules which are not so evident, and the truth of which is discovered by means of reasoning, showing their connection with the principles from which they depend. One example will suffice to illustrate this.* If two parties to a lawsuit agree to a compromise, no one can doubt that they are bound by their agreement. But let us suppose that the case has been decided by a final judgment before the compromise, and that they entered into it being ignorant that the judgment has been delivered. In that case it is not so evident whether the compromise or the judgment is to prevail. For the general rule is that agreements must be performed. But in the case of a compromise of a suit already ended by a judgment, that rule ceases, because compromises are made only where a disputed matter is undecided, and men give up their rights only from apprehension and in peril of a disadvantageous result. Thus, in a case where the matter in dispute is no longer undecided and where there is no longer uncertainty or peril, the ignorance of the party in favour of whom judgment has been given, ought not to avoid the effect which the authority of a decree gives to truth and justice. And thus the law decides this case, where the judgment is final and not subject to appeal. This is one of those rules not in themselves so self-evident that no one can doubt.^a This and some other examples taken from Domat belong particularly to Private Law, but their principles are also applicable to Public Law. And they are given here for the purpose of explaining the nature and spirit of laws considered as part of Public Law, that is to say, regarding laws not only as the rules for deciding questions arising between private individuals, but also as the rules of man's conduct whereby he is guided to the end of his creation, and the measure of those ties and obligations on which human society is constructed. And, indeed, if we look at the decision just explained as a matter between two individuals who compromised their private rights, we may on the other

* See an analogous position in Perrone, *Prælect. Theolog.* vol. 5, p. 58, *that man can know some truths in the natural order without grace.* And see vol. 1, p. 30, § 77.

^a Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 26, 27, 29 ; Domat, *Loix Civiles*, liv. 1, tit. 13, § 2, art. 7.

hand regard it as affecting the authority of the judicial power, which is matter of Public Law.¹ So we find that in jurisprudence, the same subject may have relation to different branches of the science according to the aspect in which it is seen, and the uses to be derived from it. The reason of this is, that all laws are drawn from the two primary laws of the Gospel; and whether temporal or spiritual, their ultimate end, and that of human society, is or ought to be the same. For as St. Thomas Aquinas says: *Non est ultimus finis multitudinis congregatæ vivere secundum virtutem, sed per virtuosam vitam pervenire ad fruitionem divinam.* *Tanto autem est regimen sublimius quanto ad finem ulteriorem ordinatur.*² And this is the end of all laws, because it is that of government and human society, of which they are the rules. And thus it is that (as I have shown) temporal laws refer directly and principally to the peace and welfare of the commonwealth, the *civitas terrena*; and therefore the universal system of jurisprudence, which comprehends all the laws that are the rules of man's conduct directing him to his end, would be imperfect without laws belonging directly to the celestial city,³ and an universal visible commonwealth forming part of that city. It would be imperfect because it would want something for the full accomplishment of the fundamental principles from which it springs, and because it would fall short of the object and reason of man's existence here. It would provide only indirectly for the ultimate end of his actions, and therefore it would be insufficient for the government or direction of his mind, though temporal laws are obliged constantly to take cognizance of his intentions, which are beyond the sphere of its action.

All the distinctions which I have explained regarding the nature and spirit of laws, find their place in this great scheme of jurisprudence, and are necessary for its comprehension; and this will appear clearly when we come to examine Public Law more in detail. It is sufficient here to point out the great scope and extent of the doctrines regarding laws which have been explained, and to observe, that the unity of laws arising from their general common origin and ultimate end, and the consequences that follow therefrom, producing a general analogy between all the branches of jurisprudence, seem essential to the harmony of the system which Providence has ordained for the government of mankind by the appointment of those rules of conduct called laws. There are, it is true, many things in the government and legislation of all countries at variance with that harmony;⁴ but the

¹ Domat, Loix Civiles, Traité des Loix, ch. 9, §§ 42, 43.

² Div. Thomas Aquin. Opusc. De Regim. Princip. lib. 1, cap. 14.

³ Div. August. De Civit. Dei, lib. 19, cap. 14.

⁴ See my Readings at the Middle Temple, Reading X.—On the Reasons of Laws.

truth of the principles of Universal Public Law is not impeached thereby. Experience, indeed, shows how the violation of those principles always causes mischief; and whatever peace and good government we see in the condition of nations is produced by them. This proposition is not difficult to understand; for the polity and mode of government of nations and kingdoms should be derived (as St. Thomas Aquinas says) from those of the world,^a which are directed to attain the object or end for which man was created by the fulfilment of the two fundamental laws in all their consequences. And therefore that great saint and philosopher says, that civil government is so much the more exalted in proportion as it is calculated for the attainment of that end.^b Consequently whatever is contrary thereto in laws and civil institutions must be injurious to mankind. And there must be a science of jurisprudence showing a consistent system of laws, which, as Domat tells us, are the rules of man's conduct; and that conduct consists of the steps which he takes towards the end of his creation. And Public Law directs the government of society and the conduct and administration of bodies politic to the same end, in harmony with private law, which, in like manner, directs the actions of persons in their private capacity. This is the true key to the unity of universal jurisprudence, which we have seen exemplified in detail by the distinctions and fundamental doctrines which run through all its branches.

Domat further shows the general uniformity and unity of the system of all laws, by pointing out that the distinction between immutable and arbitrary laws includes that between human and Divine laws, and that of natural and positive laws, or rather, those three distinctions are but one. For there are no natural and immutable laws that do not come from God; and human laws are positive or arbitrary because men may establish, change, or repeal them.

It may be thought, continues our great jurist, that Divine laws are not all immutable, for God himself abolished several of those which he gave to the Jews, because they were not in accordance with the new law. But still it is true that those laws were immutable, so far as regards the power of men; and the Divine laws which regulate our present state are in like manner not susceptible of change.^c Those positive Divine laws were, indeed, rather temporary and of a restricted operation than mutable, and they could not be altered by any human authority.

There is another general division which comprehends all laws under two distinct heads, that of the laws of religion, and temporal laws. In

^a Div. Thom. Aquin. Opusc. de Regim. Princip. lib. 1, cap. 14.

^b *Ibi*, p. 202.

^c Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 23.

both these classes there are immutable and arbitrary laws. Thus, among the laws regarding religion, there are some regulating external ceremonies of Divine worship and matters of ecclesiastical discipline, which are arbitrary laws established by the authority of the Spiritual Powers : and on the other hand, there are among temporal laws many immutable laws, such as those which command obedience to lawful powers, and require all men to observe good faith and honesty, and to wrong no one. Thus as the law of religion and those of civil government contain both immutable and arbitrary laws, they must be distinguished from each other by some different character or test.

The laws regarding religion, or the spiritual law, is that which regulates the conduct of man by the spirit of the two primary laws, and by the internal dispositions which lead him to his duties towards God, towards himself, and towards others, both as regards his own person, and in the public order. This comprehends all the rules of faith and morals, and those of external Divine worship and ecclesiastical discipline.

The temporal law, or the law of civil government, is that which regulates the exterior order of civil society among all men, without reference to their knowledge or ignorance of religion, and their obedience or disobedience to its principles.*

These temporal laws, or, as Domat calls them, laws of temporal policy, are of several sorts, according to the different parts of the order of society, of which they are the rules.

As the human species compose an universal society divided into divers nations, which have their separate governments, and those nations have different communications with each other both in peace and war, it follows that certain laws are necessary for the regulation of those matters. These are called the Law of Nations.

The universal polity of society, which regulates the relations of nations with each other by the law of nations, governs each nation by two sorts of laws.

The first consists of those which regard the public order of government, such as the laws called laws of the state, which regulate the way in which sovereigns are called to govern by succession or election, those which regard public functions and offices for the administration of justice, of military and financial affairs, the government and administrations of towns and provinces, and the like. These are Public Laws.

The second sort are the laws which regulate matters between private individuals as such, contracts, successions or inheritance, wills,

* Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 34.

guardianships, and other things of that nature. They constitute private law.⁴

Domat observes that these are commonly called civil laws, and the principle that private law regulates matters between individuals does not clearly distinguish it from Public and Ecclesiastical Law, and the Law of Nations; for many questions between individuals may arise in matters belonging to those branches of jurisprudence. And thus we find a blending of one branch of law with another, and a mixture of laws regulating human society, which, however, it is necessary to distinguish in a general way by their chief characteristics.

These classifications will suffice until we come to consider Universal Public Law more in detail.

CHAPTER XII.

THE NATURE OF PUBLIC LAW, TEMPORAL AND SPIRITUAL.

A FOUNDATION has now been laid for the consideration of Public Law more in detail. For we have examined the origin of laws, their use, and their principal diversities, and also the nature and spirit of laws. This investigation has given us a view of the whole extent of universal jurisprudence. And we have seen the origin and general frame of society and government, which can best be understood by deducing them from the obligations and laws on which they are founded. The nature of Public Law has been made to appear in the course of these investigations. But this subject must now be more diligently examined.

We have frequently seen how every branch of law is connected and entwined with the others, and the causes of this, which in part constitutes the unity of jurisprudence. Notwithstanding that intimate mutual relation of the different branches of law, they must be distinguished one from the other by means of their characteristics, and the purpose for which they are designed in the general scheme whereby the world is governed.

Savigny, after some reflections on law, considered abstractedly as a rule whereby men live in society, proceeds to divide it into two branches, — *politic law* and *private law*. The former, he says, has for its object the State, — that is to say, the organic manifestation of the people or

⁴ Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 40, 41.

nation; and the latter embraces all the relations of law existing between individuals, and is the rule or expression of those relations. But those two sorts of law have, he says, several points of resemblance and contact. Thus the constitution of the family, the authority of the father and the obedience of the children, present a striking analogy to the constitution of the State, and divers bodies corporate have nearly the same legal conditions of existence as natural persons. But that which profoundly distinguishes politic from private law is this, that one relates to the aggregate, considering individuals as a secondary object, while the other has for its exclusive end the individual himself, and only regards his legal existence and his different states or conditions.

The State, however, he continues, exercises many influences over private law; in the first place, with regard to its very reality. It is, indeed, the State that personifies the nation, and gives to it the capacity to act. Though a private law could be conceived out of the State as an abstraction founded on community of ideas and of manners, nothing gives to private law within the State reality and life but the establishment of the judicial power. But, he continues, it must not be believed that there really was in history a time (that of nature) anterior to the foundation of the State, when private law had that incomplete existence. Every nation is a state from the moment that it shows life. That supposed state of nature is an imaginary hypothesis of the mind looking on the people abstractedly, and without the State.*

This passage of Savigny is very valuable, for it shows the relation of public to private law, and the principle which distinguishes the one from the other, pointing out at the same time the error of that supposed state of nature from whence many false theories have been drawn, both in jurisprudence and in politics. The civil law is in accordance with Savigny.

Ulpian divides law into public and private, thus :—*Publicum jus est quod ad statum rei Romanæ spectat : privatum quod ad singulorum utilitatem.*^f And he explains this by saying, that some things (in the law) have for their object public, and others private utility. This division of the law has reference to its direct or immediate object. The welfare of the community is, or ought to be, essentially one of the ends of all temporal laws;^g but some are immediately directed to that end, while others have for their immediate object the regulation of the interests and rights of individuals considered as such.^h

* Savigny, *Traité du Droit Rom.* tom. 1, p. 23, édit. Paris.

^f L. 1, § 2, ff. De Just. et Jur. And see the same in Bracton, lib. 1, c. 1, § 2, 3.

^g Suarez, *De Leg.* lib. 1, esp. 7; et ibi édit. Div. Thomas.

^h Cujac. in tit. Dig. De Just. et Jur. ad l. 1, § *Hujus Studii*; Cujac. Op. tom. 7, col. 15; Donelli *Comment.* tom. 1, lib. 2, ch. 5, 6.

The canonists take the same view of this distinction. Thus Schmalzgrueber says :—*Jus publicum est jus quod de causis publicis ad publicam utilitatem directe principaliter et immediate est constitutum.*¹

The reflections of St. Augustine on the analogy and relation existing between the government of families and that of the commonwealth (referred to, as we have seen, by Savigny,) will make this subject clearer. St. Augustine² says :—*Hominis domus initium sive particula debet esse civitatis.* And he argues that as every commencement must be referred to an end of its own kind, and every part to the whole whereof it is part; so it follows that domestic peace has a necessary relation to the public peace,—that is to say, the regulated harmony of authority and obedience of those who live together as a family has relation to the regulated harmony and obedience of citizens or subjects.³ Here we see a beautiful explanation of the doctrine hinted at by Savigny, showing a point of contact of Public with Private Law, arising from the connexion between public and private welfare, which are the objects of laws.

Suarez shows at considerable length, with his usual learning and acumen,⁴ that the common good is an object essential to law, considered in its abstract nature as a common rule of action, ordained by a superior. But he states the difference laid down in the Pandects and Institutes between public and private law,⁵ and explains it by drawing two distinctions as follows. The common good is of two sorts. One is in itself and primarily common, because it is not within the dominion of any private person, but belongs to the community for whose use it is immediately ordained. Such are churches or sacred things, magistrates and other public authorities, common pasturages, public buildings and fortifications, and the like. Another sort of common good is so only secondarily. It is immediately private, as appertaining to private persons, and intended directly for their benefit. It is, however, deemed common for two reasons: because the commonwealth has a certain superior right over the property of individuals, from whence arises the right of levying taxes and other imposts;⁶ and also, because as each person is part of the community, the good of each, which does not redound to the prejudice of the others, is the good of the community. And thus the civil law declares that it is

¹ Schmalzgrueber, *Jus Eccles.* tom. 1, Dissert. Præm. § 5; tom. 1, p. 69.

² Div. August. De Civ. Dei, lib. 19, cnp. 16.

³ *Id est ut ordinata imperandi obediendique concordia cohabitantium referatur ad ordinatum imperandi obediendique concordiam civium.*

⁴ Suarez, De Leg. lib. 1, cap. 7, *Utrum de ratione legis sit ut propter commune bonum feratur.*

⁵ L. 1, § 2, ff. De Just. et Jur.; Inst. De Just. et Jur. § *Hujus Studii.*

⁶ See Zallinger, Inst. Jur. Nat. lib. 2, cap. 7.

advantageous to the commonwealth that the citizens be rich, and that no one should misuse his property.^p

The second distinction of Suarez is this. In human actions the proximate matter is distinguished from the motive or reason. And as the law is a moral act, the same distinction applies to it. Therefore the matter which the law relates to, is sometimes the common good primarily, and in other cases it is primarily a private advantage, and the common good secondarily. The former is the matter of Public Law, and the latter that of Private Law.

These authorities and reflections sufficiently explain the general principle which divides public from private law. Before we proceed, a celebrated law of Papinian must be examined. It is as follows, *Jus Publicum, privatorum pactis mutari non potest.*^q It relates to cases of real or apparent conflict between the freedom of contracts and laws providing for the public welfare. Cujacius makes the following observations in his comment on that law. The words *jus publicum* are used in three senses. In the first place, *jus publicum* is that which consists in sacred things, the priesthood, religion, and the magistracy or public authorities.^r Secondly, the fiscal law is called public, though it relates to the private revenue of the prince. Thirdly, the common law, that is to say, the civil law, laws, plebiscita, senatusconsulta, the edicts of the Prætors and the usages of the Roman people, which are for the common welfare of all, are called the public law. This common law cannot be altered or overruled by any private agreement or other act. Thus, for instance, a testator cannot provide that the testamentary laws shall not affect his will.^s But private rights may be changed by private agreements or other acts, according to the common maxim *Licet unicuique juri pro se introducto renunciare.*^t So any one may release a right of action which the law gives to him in his private capacity.^u It appears, therefore, that this doctrine of the inviolability of the Public Law extends not only to the Public Law, strictly so called, but to the whole common law, subject to an exception when the law leaves private persons at liberty to make such exception to the general rule, and where the law is simply permissive and directory.^v

Cujacius observes, that the principle of this law of Papinian—*Jus*

^p Instit. *De his qui sunt sui vel alieni juris*, § *Sed et major*.

^q L. 38, ff. *De Pactis*.

^r L. 1, ff. *De Just. et Jur.*

^s L. 55, ff. *De Legat.*

^t L. 29, Cod. *De Pactis*; l. 31, ff. *De Pactis*; l. 14, § 9, ff. *Ædilitio ædicto*.

^u L. ult. Cod. *De Temp. et repar. appell.*

^v Cujac. Op. tom. 4, col. 18, 19; tom. 1, col. 821, 822, edit. Venet. Matin.

Publicum—applies to the laws of the Church, for the Church is often looked upon as legally analogous to the commonwealth.

We have now to consider the distinction between Public and Private Law in Ecclesiastical Jurisprudence, for the purpose of showing the nature of Ecclesiastical Public Law.

In one sense it may be said that there is but a small part of Ecclesiastical Law that does not belong to Public Law. The reason of this is important. It is to be found in the diversity between the Civil State and the Church. The former has chiefly reference to the use of temporal things, with a view to temporal peace and welfare, which are secondary objects in the latter.⁷ And this distinction is well explained by Devoti and Zallinger, who show that the two commonwealths, the civil and the ecclesiastical, are distinct and separate, each having its independent province and authority,—one providing for the temporal welfare of its citizens and human society, while the other regards Sacred and Divine things, and has the care of whatever leads men to eternal beatitude.⁸ If we compare these fundamental doctrines of jurisprudence with Ulpian's definition of Public and Private Law, it will appear clearly that the greatest part of what falls under the latter head belongs to temporal law. And indeed the ecclesiastical law presupposes and assumes the existence of a temporal law, regulating the relations and transactions between men in civil society, and makes use of that temporal law,⁹ especially when the Church has to deal incidentally with such matters. This further reflection must be added. There is in ecclesiastical jurisprudence more of that which may be called the public element, than exists in temporal jurisprudence. For the spirit of ecclesiastical law is essentially that of the Church, the commonwealth whereof it is the municipal law; and it regards men more in their relation to that body politic and with reference to their place, rights and duties therein, than as individuals, or in their relations towards each other. The reason of this is, that the Church is not only a visible body politic, but also a mystical spiritual body, whose fundamental laws do not spring from human nature, as is the case with civil society; and they are consequently only so far affected by the natural and legal relations between persons, as they are framed for the regulation and government of men as citizens of the visible exterior monarchy called the Church. Thus, for instance, the hierarchies of

⁷ Div. August. De Civ. Dei, lib. 19, cap. 14. *Omnis igitur usus rerum temporalium refertur ad fructum terrena pacis in civitate terrena: in celesti autem civitate refertur ad fructum pacis eterne, etc.*

⁸ Devoti, Inst. Jur. Canon. Prolegom. cap. 1, § 6, 7; Zallinger, Inst. Jur. Nat. et Eccles. Pub. tom. 1, lib. 3, cap. 6; Nardi, Elementi di Diritto Ecclesiastico, tom. 1, p. 367, § 243.

⁹ Schmalzgrueber, Jus Eccles. Univers. tom. 1, Dissert. præm. § 7, num. 236.

order and jurisdiction and the Supremacy of the See of St. Peter are positive Divine constitutions, not springing from any principle in created nature or human society; but there are subordinate ecclesiastical laws regarding the exercise of sacred functions, or collateral to them, such as those limiting local boundaries and regulating administrative matters, which are grounded on the same kind of reasons as temporal laws. We perceive here a principle dividing ecclesiastical laws into two sorts, each having a certain distinctive spirit, and being grounded on a different class of reasons. But the spiritual character of the Church is the most excellent and the most essential to its very nature as a mystical body politic; and so it is the real spirit of all ecclesiastical jurisprudence. Therefore, the spirit of ecclesiastical laws is to regard persons in their relation to that mystical body rather than to each other, and this makes the public more considerable than the private element of the system. We see this position exemplified by the way in which ecclesiastical jurisprudence treats of the sacraments. Their mixed nature^b places them within the province both of law and of theology. The canon law defines and regulates them as part of the public administration of the authority of the Church, leaving to theology their end and effect on the particular person. In the same manner truths which theology proposes to each person individually as dogmatic to be believed, assume in jurisprudence the form of rules of outward action, and laws for the constitution, government, and peace of the Church.^c

These reflections on the spirit of Ecclesiastical Law with reference to the distinction between Public and Private Law may seem rather abstruse, and they do not lead to the establishment of any clear line of demarcation, but they are necessary to understand the peculiar nature of Ecclesiastical Public Law according to the canonists.

Zallinger explains that Ecclesiastical Public Law comprehends the rights, powers, and obligations of those who by Divine institution preside in the Church,—that is to say, the bishops and especially the Supreme Roman Pontiff. Their power, he continues, is called Public, because it is not confined to the interior forum, but extends to governing the faithful in spiritual matters and exercising jurisdiction, and to an established order of authority and subordination. And Ecclesiastical Public Law is either *common* and *universal*, belonging to the whole Catholic Church, or *public and particular*, consisting in special usages of particular countries or places, and in concordats between different

^b Devoti, *Inst. Canon.* lib. 2, tit. 2, § 1, 2; *Concil. Trident.* sess. 7, can. 8; *Decret. Gratian.* can. 32, dist. 2; *Tract. de Consecratione.*

^c Zallinger, *Inst. Jur. Natur. et Eccles. Publ.* tom. 2, p. 211; *Lib. Subsid.* cap. 1, § 5, tom. 3, *Prolegom.* cap. 7, § 76.

nations and the Holy See.^d The latter for the most part belongs to history, and forms an important part of the Public Law of Europe. It cannot be understood without a knowledge of the Ecclesiastical Public Common Law, to which it is a sort of exception and supplement. That Common Law is chiefly to be found in the Decretals, but mingled with other matters. The following sketch will show sufficiently for the present purpose what it is.

The Book of Decretals begins with the title—*De Summa Trinitate et Fide Catholica*. This is also the first rubric of Justinian's code,—of the *Sexte* and the *Clementines*; for, as Reiffenstuel says, this is the source of all justice,* and especially necessary for an ecclesiastical judge.^f This title comprises the doctrine of one Universal Church, which is the foundation of Ecclesiastical Public Law.

The Church having thus been placed before the eyes of the reader, the next step leads to the public governing ecclesiastical authority. Zallinger explains this authority to be a complex of various rights belonging to the government of the Church. It comprehends the right of preaching the faith and doctrine of Christ, and deciding infallibly controversies regarding them:—baptizing and administering the other sacraments; prescribing Divine worship and sacred rites; enrolling and ordaining the ministers and Priesthood, and especially instructing and training them:—deciding disputes among them; restraining and punishing offenders, &c.^g Zallinger goes on to say, that there are two things to be taught regarding ecclesiastical authority. The first, that it is of Divine institution altogether separate and distinct from all natural, civil, and political powers: and the second, that it is distributed according to certain organic laws among those to whom, by institution of Christ or by disposition of the Church, it belongs.

Our Lord constituted the Church in the form of a commonwealth or body politic, separate and distinct from the civil state; and he gave to it peculiar magistrates, with power to govern and administer it.^h That power was, in the first place, given to St. Peter and his successors,ⁱ constituting the summit and plenitude of jurisdiction, and then, that Supreme Primacy having been constituted, power was given to

^d Zallinger, *Inst. Jur. Natur. et Eccles. Publ.* tom. 3, *Prolegom.* cap. 7; *De Jur. Eccl. Publ.* etc. § 74.

^e Reiffenstuel, *Jus Canon.* tom. 1, p. 34.

^f Schmalzgrueber, *Jus Eccles.* tom. 1, p. 168.

^g Zallinger, *Inst. Jur. Eccl.* tom. 3, p. 52, *Prolegom.* cap. 7.

^h Devoti, *Inst. Jur. Canon.* lib. 3, tit. 1, § 2.

ⁱ St. Matt. xvi. 13; St. Luke, xxii. 31; St. John, xxi. 14, et seq.; Bolgeni, *l'Episcopato*, tom. 1, cap. 2, art. 2; cap. 7, art. 2.

the Apostles, including St. Peter, and to their successors,^k except with regard to those extraordinary rights and powers which terminated with the Apostles themselves.^l

By Divine ordinance, besides St. Peter and the Apostles, and the successors of both, (that is to say, the Roman Pontiff and the other Bishops,) ministers of an inferior order are instituted. And for the more convenient government of the Universal Church certain degrees or gradations of offices are appointed by ecclesiastical authority, and dioceses, provinces, and larger districts are defined, from whence diocesan bishops, metropolitans, primates, and patriarchs, are entitled. And again, synods—diocesan, provincial, national, and general or œcumenical.^m

These sacred persons and degrees present the idea of the hierarchy. In it there is the distinction between the powers of order and of jurisdiction, both of which are distributed in regular gradations. And jurisdiction is of two sorts, that of the internal forum, and that of the external forum. The latter is public and governing, and chiefly resides in the episcopate and its various gradations. These are to be looked upon in two ways,—that is to say, as regards each separate bishop, and assemblies or synods. And in both respects their relation to the See of Peter is to be considered.ⁿ

Ecclesiastical Public Law having defined the form, and, as it were, the machinery of ecclesiastical polity, proceeds to the objects over which the public power of the Church extends. These are either matters of Divine law, or matters of human law. The former are called causes of faith and morals, and the latter causes of discipline. Causes of faith and morals are matters of natural right and wrong, and causes of religious truth or dogma, or of communion, or separation, or schism. Discipline is usually referred to the following four heads. Liturgical or internal discipline, to which belong acts of religion and virtue, ceremonies, festivals, penances, fasts, and the like. The remainder of discipline is external, and consists of the creation and ordination of ministers, promotion to offices, and the whole polity of the clergy; the government of the Church, that is to say, the mode of exercising the legislative, inspectorial, and the judicial powers; and, lastly, the management and use of the temporal property of the Church.^o

^k St. John, xx. 19; St. Matt. xviii. 18; St. Matt. ult.; St. Mark, ult.; St. Paul, Ephes. ii. 20; St. John, Apocal. xxi. 14; Bolgeni, *l'Episcopato*, tom. 1, cap. 2, art. 6.

^l Zallinger, *Inst. Jur. Eccles.* tom. 3, *Prolegom.* cap. 7, § 80, 81. See also Hooker, *Eccles. Polit.* b. 7, § 4.

^m Zallinger, *ibi*, § 82, 83.

ⁿ *Ibi*, § 81.

^o *Ibi*, § 85, 86.

One head of Ecclesiastical Public Law remains to be noticed. It regards the relations between the Church and the State or civil government. For, as Zallinger observes, though the ecclesiastical is separate and different from the natural and political powers, yet the temporal power has rights or duties of defence or protection, and patronage regarding the Church and ecclesiastical causes.²

This analysis of the subject shows that Ecclesiastical Public Law comprehends the whole law of the constitution of the Church, which may be thus summed up. The canon law regards the Church as a monarchical body, or a body politic in the nature of monarchy, of which the Supreme Pontiff is the Sovereign Head.³ This body politic, thus fashioned in a monarchical form, has a senate called an œcumenical or general council, of which the Pope is the head and a necessary component part.⁴ The Catholic Church unites a federal to a monarchical constitution. It is composed of a variety of ecclesiastical bodies or churches, each of which has its superior bishop, its synod or church senate, and its peculiar laws, customs and privileges. All these bodies are represented (though not by way of delegation) in the œcumenical council by their bishops. And they stand respectively in divers relations to the civil communities of the countries where they exist, and are affected in divers ways by the temporal laws, customs and institutions of those communities. But notwithstanding these local peculiarities, they are all bound together into one body by identity of faith, by similarity of constitution, by community of laws, and by their submission to one supreme power—the Holy See, which is the centre of their unity, and the summit of the hierarchy of jurisdiction.

It is easy to perceive, on examining this sketch, the points of contact of ecclesiastical with temporal Public Law, and the way in which both operate together in the government of man and the direction of his actions towards the end of his creation. The universality of Christianity forbids that its laws should be subjected to a purely national or municipal direction.⁵ They therefore extend beyond, and, as it were, over temporal municipal laws, but without weakening or injuring their authority. For the Church was not intended to supersede temporal laws and governments; as its origin and objects are different from those of civil polity.⁶ And this, according to St. Augustine, is the meaning of the declaration of our Lord, *My kingdom is not of this*

² Zallinger, *Inst. Jur. Eccles.* tom. 3, Prolegom. cap. 7, § 87.

³ Devoti, *Inst. Canon.* Prolegom. cap. 6, § 19.

⁴ *Ibi*, § 21, 22.

⁵ Savigny, *Traité de Droit Romain*, tom. 1, p. 27, édit. Paris (trad.), 1840.

⁶ Suarez, *De Leg.* lib. 3, cap. 5, § 5; *Div. August. de Civ. Dei*, lib. 19, cap. 17.

world." In each country, the relation between the Church and the State, and the subjection of persons and things to the temporal law, (or the latter circumstance only, where the Church has no relations with the State,) produce a contact between Ecclesiastical Public Law and Municipal Law. And this proposition applies even in countries where the laws of the Church are not enforced by the civil power, for there those laws exist as matter of fact, and are practically observed by those who belong to the Church, so that practically they operate on the government of society, through the power of religious belief and duty. And the universality of Ecclesiastical Public Law places it in contact with the general law of nations, of which in one aspect it forms part.

The force of these reflections will appear when we consider that among all the aggregations of men, constituted and governed by organic laws for various purposes in the entire world, the Roman Catholic Church is the most numerous and the most extended. The world is governed by the laws of different bodies politic, such as nations, states, provinces, and cities, and by the civil power of those communities, within their respective territories: but the Catholic Church is not confined to any particular territory, and it is not only a spiritual mystical body, but also a *perfect* body, and a community having peculiar municipal laws, and an outward system of government and administration complete in itself. Therefore the Catholic Church is one of the means whereby mankind are governed. And its Public Law is an essential part of the Public Law of the world. I have already shown the unity which exists between ecclesiastical and temporal law, though each has its own immediate object and its peculiar spirit. And this unity, together with the distinction between the province of each, makes the two systems harmonize together and concur in directing man towards the end for which he was created. Thus St. Augustine beautifully shows,* that the part of the City of God which is on earth requires that temporal peace which it is the province of the terrestrial city (*civitas terrena*) to procure. And on the other hand, I have fully proved that temporal laws and government are not able to carry into effect all consequences which arise from the two primary fundamental laws, nor to dispose men's minds to their fulfilment; and that therefore the spiritual law and authority are necessary to fill a void in universal jurisprudence and to bring the law of grace in aid of the temporal law.

It is important to observe regarding the relations of the two kinds of powers and laws (the temporal and the spiritual) with each other, that the former are necessarily local and restricted within territorial

* St. John, xviii. 36; Devoti, Inst. Canon. lib. 3, tit. 1, § 8, 9.

† Div. August. de Civ. Dei, lib. 19, cap. 17.

limits, while the latter are required by their very nature to be universal. Temporal laws (except the immutable part)¹ differ according to the form and nature of the government of each country,² and the habits, customs, wants, and character of the people. And a form of government useful and wise in one country would be utterly impracticable, or at least inconvenient in another, though there are certain principles on which all governments are founded. The reason of this diversity is that the mode of obtaining the temporal advantages which are the immediate object of civil government, must differ according to circumstances of time and place, and according to the various wants of man. And as the laws of civil society are derived from nature, so their form and results must vary as nature varies. And these diversities necessarily lead to the conclusion that temporal laws and governments must be restricted within certain territories. Therefore when they are unduly extended, so as to violate the principle called *nationality*, inconveniences or even convulsions ensue. Thus Hermogenianus refers the separation of mankind into nations, to the *jus gentium*.³ But it is otherwise with the Church and the Ecclesiastical Law. They are not affected by the causes of diversity above referred to. The constitution of the Church is the same everywhere in all its essential characteristics, and the spirit of its laws is the same; and those laws differ in each country only in that subordinate part which is not essential to the Public Law of the Church, but merely regards the details of administration and what are called mixed matters, which fall both under the temporal and the ecclesiastical law. And as the Church is a positive Divine institution having an universal mission, its fundamental and essential laws are also universal. Their direct purpose is not the attainment of temporal advantages and objects which differ according to time and place, the variety of human wants and other circumstances, but the fulfilment of a spiritual end beyond this life,⁴ and common to all mankind. Therefore the Public Laws of the Church are not restricted within particular territories, but belong to a commonwealth unlimited in extent and universal. And so we find that though for temporal purposes mankind are divided into various nations, kingdoms and states, the laws and government of which differ very widely, the unity of the human race is preserved by the Catholic Church and by Ecclesiastical Public Law, which are everywhere essentially the same and governed by the same spirit, that of the Gospel.

¹ L. 9, ff. De Just. et Jur.

² Montesquieu, *Esprit des Loix*, lib. 2, ch. 1; l. 9, ff. De Just. et Jur.

³ L. 5, ff. De Just. et Jur.

⁴ *Est igitur Jus Canonicum quod civium actiones ad finem æternæ beatitudinis dirigit*, Lancelot. *Inst. Jur. Canon.* lib. 1, tit. 1, § 1.

CHAPTER XIII.

REFLECTIONS ON THE END OF HUMAN SOCIETY AND THE RELATIVE USES OF THE SPIRITUAL AND TEMPORAL LAWS.—THE DIVISION OF MANKIND INTO STATES AND NATIONS.—LEGAL CHARACTER OF THAT INSTITUTION.—CONSEQUENCES WITH REFERENCE TO POLITICS AND ECONOMIC SCIENCE.

DOMAT has prefixed to his book on Civil Law, a plan of the order of society, establishing its first principles and foundations, because all the laws of men's conduct among themselves are the rules of that society in which God has placed them, and therefore those laws and their subject matter are to be discovered in that order.* And the great civilian resorts to the same plan in the preface to his work on Public Law, for the purpose of giving an idea of the matters of Public Law which he is about to treat, and the laws which are the rules of those matters.

This method is grounded on profound reason. For, as St. Thomas Aquinas shows, the end for which man was created and placed here is the first fundamental principle of society,^d though the immediate purpose of human society is temporal peace, and the advantages to be derived from temporal things;^e and therefore the excellence of civil government, and its laws, depend on that fundamental principle of the order of society and the consequences arising therefrom. *Tanto autem est regimen sublimius quanto ad finem ulteriorem dirigitur.*^f The doctrines of Domat are in conformity with this maxim of St. Thomas.

The necessity of regarding the ultimate end of human society, which is that of man, in all political science, is shown in the chapter of St. Augustine just cited. And it cannot be neglected without violating the two primary laws and causing discord and other evils. Macchiavelli's famous treatise, though written for a different purpose, exemplifies both these positions, which are denied by implication in other books, less notoriously immoral, belonging to that school called *utilitarian*, because it makes temporal utility the ultimate end of law and politics, contrary to the sublime doctrine of St. Thomas, who will not

* Domat, Droit Publ. Preface.

^d Div. Thom. Opusc. de Regimine Princip. lib. 1, cap. 14.

^e Div. Augustin. De Civ. Dei, lib. 19, cap. 14.

^f Div. Thom. ubi sup.

allow that even virtue is the real end of civil society.^a And this important truth, that the end of man is not the enjoyment of mere temporal good, we have already seen fully explained by Domat. Every system of law and politics that denies it, either directly or by implication, or takes no account of it, is grounded on a fiction, and by starting from an incomplete view of the nature and obligations of man, leaves out a great portion of legal and political science. Those who fall into this error must omit a considerable part of the laws and principles by which the world is governed. For the laws of man are the rules of his conduct, and that conduct must have an object to which those rules direct his actions. We cannot, therefore, discover them all if we take for the ultimate object one which is only intermediate and subordinate. These reflections may perhaps seem, at first sight, somewhat too abstruse for practical use. But the contrary is shown all through our Commentaries.

For the mind of the reader has constantly been recalled to the two primary laws as the source of all others in this world, both human and divine,^b and as directing man to the end of his creation. And so I have shown the unity of jurisprudence, and the way in which it is connected with theology and the other moral sciences which teach and direct the internal man. Thus it appears, how ecclesiastical and civil polity and laws really harmonise and concur together, though they sometimes seem to clash, because their immediate objects are different: whereas, without unity of purpose in the government of man, they would draw him in opposite directions, and become essentially discordant with each other, like circles each traced from a different centre. And in like manner I have shown the necessity of the Universal Church and her laws to fill that void in the government of mankind and jurisprudence which temporal polity and laws must leave, because it is impossible that they should give all the rules required to direct even the outward actions of man towards his end, by the fulfilment of all the consequences of the two primary laws. No system of jurisprudence, excluding the Catholic Church, can fill that void. And her laws once known demonstrate the great truth which St. Thomas Aquinas has just told us. *Non est ultimus finis multitudinis congregatæ vivere secundum virtutem, sed per virtuosam vitam pervenire ad fruitionem Divinam.* And if this be the object of human society, it is clear

^a Sed quia homo vivendo secundum virtutem ad ulteriorem finem ordinatur, qui consistit in fruitione Divina, ut supra jam diximus; oportet eundem finem esse multitudinis humanæ quæ est hominis unus. *Non est ergo ultimus finis multitudinis congregatæ vivere secundum virtutem, sed per virtuosam vitam pervenire ad fruitionem Divinam.* Div. Thom. De Regim. Princip. lib. 1, cap. 14.

^b Matt. xxii. 38.

that all the laws of society must be directed to that object. But without the Church and the Spiritual Law, the laws of human society cannot attain it, and the end of that institution will be frustrated. Man will be reduced simply to what St. Augustine designates as *civitas terrena*, which being imperfect (insufficient for its ultimate end) will not accomplish even its immediate temporal purposes fully.

We may find the key to many problems of history and politics in this conclusion. But we must confine ourselves here to one point, namely, the objection that some countries enjoy great peace and prosperity, though the principles given above are violated or disregarded. Domat furnishes an answer. He observes, that society subsists and flourishes though the spirit of the two primary laws has very little power there, and it seems therefore to be maintained by other principles. But he urges, that though society is in a state strangely different from that which those laws require, yet this does not affect their validity; and they are nevertheless essential to the government of mankind, so that whatever degree of peace and order are to be found in the world may be traced to their operation.¹ And in the study of all political science, we see frequently a state of facts apparently contradictory to principles which are nevertheless true. So there are not wanting instances of countries (such, for instance, as the republic of Venice and other Italian States), which have flourished both materially and intellectually under a more or less bad government, apparently in defiance of the rules of politics. This paradox is explained by collateral circumstances, which leave untouched the true principles of politic science. And a careful examination will show, that in truth those principles can never be violated without causing evil sooner or later. Besides, many men are prosperous, happy, respected by the world, and even amiable and useful, though they habitually disregard religion, and many precepts of morality. But this does not refute the position that religion and morality are the best and only real foundation of happiness and usefulness even in this life.

These arguments all apply to the particular objection that the prosperity and greatness of some countries seems to refute practically the doctrines of Public Law, which show that the Universal Church and the Spiritual Law are requisite to attain even the temporal objects of human society completely; and on this subject some further reflections are requisite. It is difficult to believe *a priori*, that whereas civil society has an immediate end or object regarding the terrestrial city, and an ultimate end belonging to the celestial city (which includes the Church), and the laws of both cities on earth spring from the two

¹ Domat, *Loix Civiles, Traité des Loix*, ch. 1, § 8.

primary laws, yet those two polities are not intended to be useful and necessary to each other, for the attainment of the ultimate end of man's creation. Such a belief would be absurd. So St. Augustine shows how that part of the celestial city (*Civitas Dei*) which is on earth requires the peace of the *civitas terrena*,¹ though in another sense he frequently tells us how the world and the Church are constantly striving with each other, because the passions of men make mere temporal pleasures and advantages their ultimate object. Therefore we may conclude that civil society is insufficient, by itself (notwithstanding appearances to the contrary in particular instances), when the Church is oppressed and disregarded.

But the argument may be carried further. For wherever the Catholic Church has exercised influence over a whole nation, it has left results which centuries cannot obliterate, though later generations may attribute them to other causes. It has left a spirit in its jurisprudence—a character impressed on the people—and even external institutions and living laws, which all come from the *Civitas Dei*, the Catholic Church. Can it be said, for example, that the laws and institutions, and civilization of England, would be what they are if they had not existed side by side with the Church and her laws? Moreover, the general effect of the Catholic Church and its laws on mankind, and on the formation of legislation and jurisprudence and governments in modern Europe, must not be forgotten by those who appeal to results in particular countries, as being derived from merely temporal causes. They should also ask themselves and impartially consider whether temporal laws and civil society alone could have led to and accomplished all that they so much admire in modern institutions and civilization. And, lastly, they should inquire whether there are not social and material evils in the proudest and richest countries, which the temporal law, and the power and influence of civil society, cannot by themselves remedy? Experience proves that the Church and the Spiritual Law can deal with those evils; and this is precisely because, as I have shown, it fills a space which temporal jurisprudence and government leave vacant. And acting on mankind through the law of grace, and by its universal system and various external means, it is able to accomplish what nothing municipal can do, because all municipal or national institutions are necessarily subservient to the national opinion, swayed by temporary and local influences, and shackled by laws grounded on mere temporal administrative convenience; whereas, that which is required is not part of mere municipal law and government, but belongs to the system of general polity and universal jurisprudence,

¹ Div. August. De Civ. Dei, lib. 19, cap. 7.

whereby the human species is governed. It is the branch of jurisprudence omitted from the scheme of municipal laws, considered as such, and it belongs not to particular, but to Universal Public Law. It is, indeed, part of the system of a body politic of a mixt nature, visible and mystical or spiritual, a portion whereof only is contained in this world, and which, therefore, cannot be identified with the legal and political institutions of any particular state or country, or with any temporal laws or government.

But these objections are here dealt with merely to meet the apparent difficulty arising from the condition of some countries, where the temporal law and human society seem at first sight to fulfil every purpose, without the Universal Church. I will only add, that even in those countries the Universal Church exists and exercises a local living influence on society; besides that which operates on mankind in general, and besides the laws and institutions, civil and ecclesiastical, originally derived from those of the Church. But this disquisition belongs properly to the philosophy of history and politics, and, indeed, it ought to be treated separately, for the purpose of showing the influence of the Catholic Church on the formation of European society, and on the history of the construction of governments. We have here only to examine that aspect of the subject which belongs to Public Law, and to lay down principles of pure science, the truth of which cannot be shaken by apparent difficulties arising from circumstances, social and political, of different countries, or from the disturbing forces of human passions and corruptions.

This comprehensive view of the greatest principle on which the unity of public law and of human society depends (the proposition that the ultimate object of society and government is the end of man's creation, and that so the laws, both temporal and spiritual, of man's conduct, though with different direct purposes, have but one ultimate design), lead us naturally to consider the two aspects in which mankind may be seen, that is to say, as one body, and as distinct communities, or nations and states.

The primary natural law has no regard to any divisions among mankind, because, as we have seen, it comprises the absolute, as contradistinguished from the hypothetical duties and rights of man.¹ This is a principle to be kept in mind, because the secondary does not destroy the primary natural law, from which many important consequences flow.

Zallinger divides natural jurisprudence under four heads:—I. Private Natural Law; II. Social Natural Law; III. Public Natural Law; and

¹ Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* tom. 1, lib. 1, cap. 3, § 16; *ibi*, cap. 1, § 3; *Pufend. Droit de la Nat. et des Gens*, liv. 2, ch. 3, § 24.

IV. the *Jus Gentium*. The first considers man simply in his essential natural condition, unaffected by any adventitious status or relation. The second regards secondary, hypothetical, or adventitious natural law, including that which arises from the lesser associations of men. The third is concerning civil society. The fourth comprises the rights and duties of states or nations, considered as moral persons or bodies politic.

The two first of these heads are, as it were, anterior to and independent of any divisions of mankind or of territories, though the second includes the whole of private secondary natural law, that is to say, the natural law regulating the rights and duties between man and man in consequence of their dealings and transactions with each other, especially those arising from the institution of property. The third requires to be traced from its source with reference to the matter now under examination.

Savigny observes, that the rules of law differ in the nature of their origin; for they may spring from law properly so called (*jus* or *æquitas*), or from something foreign to jurisprudence. These foreign elements which introduce themselves into the law, sometimes produce results *contra rationem juris*. This he names *anomalous law*, as contradistinguished from that proceeding out of law (*jus*) itself, which he calls *nomal law*, and the Romans sometimes designate as *jus commune*.^a The anomalous law is described thus by Paulus, under the name of *jus singulare*. *Jus singulare est quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est.* Savigny gives several examples of these exceptional arbitrary laws arising out of matters of fact, and most frequently having the character of *privilegium*, though not of a personal individual character. Of this nature are laws making exceptions to the general rules of law in favour of particular sorts or classes of persons. In some cases, this class of laws arise from old national usages and habits. In all it is foreign to jurisprudence, strictly so called, though legal consequences may arise from the *jus singulare* itself.

This general view will enable us to understand the scope of a celebrated, but rather obscure law of Modestinus, wherein he says, enumerating the sources of law—*Omne jus aut consensus fecit, aut necessitas constituit, aut firmavit consuetudo*.^b The first refers to written law, the third to custom, and the second, *quod necessitas constituit*, is one sort of anomalous law, or *jus singulare*. Cujacius says, that this division was derived from Menander, and observes, that it

^a Savigny, *Traité du Droit Rom.* tom. 1, ch. 2, pp. 58, 59, trad. Paris, 1840.

^b L. 16, ff. De Legib.

^c L. 40, ff. De Legib.

must be taken as a classification not of all laws, but only of three sorts of Roman Laws, that is to say, *lex, senatus-consultum, et longa consuetudo*.^p And he shows, from a law of Pomponius,^q that the following was the reason of the origin attributed to *senatus-consultum*. The increase of the Roman people, which made their assemblies difficult and inconvenient, caused public affairs to fall into the hands of the Senate. *Necessitas ipsa curam reipublicæ ad Senatum deduxit*. And so the Senate commenced making regulations or laws, which were called *senatus-consulta*. The same cause in later times produced the invention of assemblies composed of the representatives of the people. And in the constitutional history of England, another illustration is to be found, for the inconvenience of assembling in Parliament the lesser tenants in capite, caused them to elect representatives; and hence arose the parliamentary representation of counties by knights of the shire. Here we find the way in which legal institutions are created by the operation of the very same principle from which the anomalous law or *jus singulare* springs, *quod propter aliquam utilitatem (vel necessitatem) introductum est*. For necessity, as Savigny observes, differs not in principle from utility. And it would be very interesting to trace the effect of this sort of laws in the formation and development of legislation and political institutions, so as to show the reasons on which they were originally grounded, and their historical spirit.

This principle explains the origin of the division of mankind into nations or states. For the increase of mankind beyond the numbers for which the simple patriarchal rule could suffice, led to the institution of civil governments, and the human race was necessarily divided because no government could extend its authority or its functions to the whole. Thus Hermogenianus, enumerating the different subjects of the *jus gentium*, says, *Ex hoc jure gentium . . . discretæ gentes, regna condita*.^r The separation of nations is mentioned in the Pandects as springing from secondary natural law. It is matter of *jus singulare* and *quod necessitas constituit*. It arises from civil government, and is in truth a subordinate institution of Public Law, to the formation of which various circumstances, such as diversities of climate, soil, language, race, and geographical position, have contributed.

It was necessary thus to determine the legal character of this institution for the purpose of understanding the spirit of the Law of Nations, which is created from the division of the world into separate bodies politic, and is therefore (as we have seen) placed last by Zal-

^p Cujac. Op. tom. 3, col. 373; Observat. et Emend. lib. 14, cap. 16.

^q L. 2, § 8, De Orig. Jur.

^r L. 5, ff. De Just. et Jur.

linger,* after the internal Public Law of States. This will appear from the observation of Burlamaqui, that the civil state does not supersede, but on the contrary, confirms the obligations of men towards each other arising from natural society; and civil society itself is natural society, so modified as to contain a sovereign power. The establishment of civil societies, he continues, produces new relations among men, those between nations and states, which give origin to international law and politics. And those states acquire a legal personality, and therefore, to them may be attributed the same rights and obligations which belong to individuals as members of human society, so that if justice imposes on private men certain duties towards each other, it prescribes the same rules of conduct to nations (which are aggregates of men) in the affairs and intercourse one with the other.¹ This suffices to refute the notion of Spinoza and Hobbes, that every independent community has a right to do whatever it pleases to other commonwealths, they living in a perpetual state of war;² unless we admit that the natural state of man is a state of war, a doctrine refuted not only by jurisprudence and philosophy, but by Religion.

Another effect of the subordinate and secondary legal character which belongs to the division of states and nations, is to reduce within just limits what is called nationality, which in different forms has produced much mischief, causing wars of mere conquest and aggrandisement; giving a colour of duty and patriotism to envy and implacable hostility against a particular nation, and making it a leading principle of policy and statesmanship that each country should strive by all means to weaken and impoverish others, and especially its neighbours.

These pernicious errors are abandoned in proportion as the progress of civilization and commerce and the useful arts have taught nations and states their true interests and their duties to each other, prescribed by the second of the two fundamental laws coinciding with those interests. Here we find a practical exemplification of the doctrine laid down by Domat that those laws cannot be violated with impunity, and that whatever peace and welfare exist in the affairs of this world arise from their observance.

The famous controversy between Selden and Grotius about the liberty of the seas, shows the bad consequences of neglecting the true spirit of the division of mankind into nations, and so extending exclusive national claims beyond what the principles of Public Law allow,

* And see St. August. *De Civ. Dei*, lib. 19, cap. 7.

¹ Burlamaqui, *Principes du Droit des Gens*, tom. 4, pp. 14, 15, edit. Paris, 1820; Zallinger, *Inst. Jur. Nat. et Ecclies. Publ.* tom. 1, lib. 3, cap. 1, § 267.

² Whentou, *Hist. of the Law of Nations*, p. 100; Spinoza, *Tract. Theol. Polit.* c. 3.

by making that the exclusive property of one state, which the law of nature has left common to all mankind.*

Another example is to be found in the spirit of that policy which dictated the Navigation Laws,[†] a spirit governed by the notion that the interest of every country is hostile to that of others, and that each must therefore strive for some exclusive advantage, to the prejudice of the rest of mankind. Whereas sound reasoning and experience have shown the reverse of these propositions to be true. And here we must remark the harmony between the principles of political economy and those of Public Law. But this concordance is perfectly natural. For all political science must agree with the laws on which human society is constructed and governed; and so we shall see that a broad comprehensive view of Public Law, and a thorough knowledge of its spirit and fundamental grounds, conduce to advance and elucidate every branch of the science of government and public administration. Though jurisprudence and politics are distinct sciences, yet both are branches of one scheme of terrestrial government, and it is impossible that anything true in the latter should be otherwise than in accordance with the two great fundamental laws, and in furtherance of the end to which they are directed as rules of man's conduct. Thus, by determining the legal character of that remarkable institution of Public Law, the division of the world into nations and states, and by showing that it is *jus quod necessitas constituit*, not superseding the laws which constitute the unity of human society, we are led to the conclusion that principles of political and economic science in accordance with those legal doctrines, must be more calculated to promote the welfare of mankind than opinions dictated by an opposite spirit. If it were otherwise, human society, social and political or civil, must be a machine whose uses are at variance with the rules on which it is constructed, a supposition contrary to reason and inconsistent with our knowledge of the Divine wisdom and benevolence.

* Grotius, *Droit de la G. et de la P.* liv. 2, ch. 2, § 3, and notes by Barbeyrac; Pufend. *Droit de la Nat.* liv. 4, ch. 5, § 3, and notes; Vattel, *Droit des Gens*, liv. 1, ch. 23; 1. 9, ff. *ad Legem Rhodiam*; Co. Litt. 261 a, n. 1.

† Adam Smith, ed. M'Culloch, 1850, note 11, by M'Culloch.

CHAPTER XIV.

THE DIVISION OF THE WORLD INTO STATES AND NATIONS CONSIDERED
WITH REFERENCE TO ECCLESIASTICAL PUBLIC LAW.

The Anglican Church—The Greek (separated) Church—The Roman Catholic Church—Its Construction—Superiority and Obedience, or Subordination—The Hierarchies of Order and Jurisdiction—The Four Elements of Human Society—Relation of Society to Ecclesiastical Public Law—Ecclesiastical Public Law independent of the Divisions of the World into Civil States—But that Division not neglected by Ecclesiastical Public Law—Contact of Ecclesiastical Public Law with the Political Divisions of the Earth, and Temporal Laws—How it operates with them.

We have already observed that the universality of Ecclesiastical Public Law brings it in contact with the law of nations, of which, viewed under one aspect, it is a branch. This position evidently does not apply to the law of the various churches or religious bodies politic which have no point of unity of their constitution beyond the limits of the country in which they are situated. Those bodies have their own peculiar organic laws, and they stand in various relations to the temporal government and civil society. They are in the nature of *collegia*, that is to say, bodies politic or societies wholly within the civil community, and therefore of a municipal nature.* This is so in a legal sense, though they may have relations of a religious kind, and analogies or similarity of form and belief with foreign bodies of the same sort. For those foreign relations and analogies are matter, not of law but of theological belief or opinion, or merely arise from historical reasons.

Thus Gladstone, in his very able work on the relations of Church and State, shows that according to Hooker's general views, the same persons compose the commonwealth of England and the Anglican Established Church, and that the two are one society, which society is termed a "commonwealth, as it liveth under whatsoever form of secular law and regiment,—a Church as it hath the spiritual law." The Crown is the head and chief magistrate of both Church and State, with high ecclesiastical prerogatives, including the right of calling and dissolving the greater assemblies; that of assent to all Church orders which are to have force of law; the advancement of prelates; and the highest judicial authority. And the theory of Warburton's "Alliance of Church and State," though based on the distinct origin and office of the Church, still supposes those two societies to be coextensive, and to form a union within a certain territory containing the whole

* Devoti, Inst. Canon. tom. i. Prolegom. § 4, n. 2; § 6.

external government of both Church and State.* The same principle is manifest in the oath of supremacy prescribed by Statute 1 Geo. I. st. 2, c. 13, which declares that no foreign prince, person, prelate, state or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm. The statute thus clearly confines all ecclesiastical or spiritual jurisdiction, power, superiority, pre-eminence and authority in the national Church, within the territories of the Civil State. This principle is part of the constitution of the Established Church in Scotland, and of the Protestant bodies in France and Germany, established or recognised by the temporal law, whatever may be their theological connexion or communion with each other.

We must conclude that the constitutional laws of the communities so characterized are essentially municipal, and do not appertain to nor come in contact with the law of nations, nor bear upon the subject of this chapter. They belong to the head of internal Public Law,—that is to say, the Public Law of each particular state.

The society commonly known by the name of the Greek Church is less exclusively municipal and national, for its organization extends over the Russian empire—Greece, Turkey, and several other countries in the east, governed by separate sovereigns. But the Russian part of this communion is so greatly subject to the ecclesiastical authority and supreme headship of the emperor, who directs its supreme synod,^b that it has become almost entirely national and municipal. The creation of the Patriarchate of Moscow in 1589, and that of the permanent Russian synod by the Emperor Peter in 1721, withdrew the Russo-Greek Church from the jurisdiction of the Patriarch of Constantinople, and made it in substance an exclusively national church, like the Anglican Church.^c The Public Law of the Greek Church has no relation to the general law of nations or the division of mankind into states considered as an institution, though it regards the connexion and intercourse with each other of those particular countries where that community is established or recognized by the temporal law. Such are the constitutional characteristics of the religious bodies separated from the Roman Catholic Church with reference to the subject which we are now considering.

We come now to the Roman Catholic Church itself: and here we find that Ecclesiastical Public Law, which is referred to in the title and commencement of the chapter. This will appear clearly from even a cursory view of two fundamental principles in the canon law, and of the legal character of the Roman Catholic Church considered

* Gladstone, "The State in its Relations with the Church," pp. 7, 8, 11, 12.

^b Palmer, *Treatise on the Church*, vol. 1, p. 179.

^c Morone, *Dizionario di Erudizione Storico-Ecclesiastica*, vol. 32, p. 142.

as a body politic. Those principles are known by the technical terms *majoritas et obedientia*, superiority and obedience or subordination. We shall find these pervading the whole system of temporal as well as Ecclesiastical Public Law, but they are nowhere better explained and exemplified than in the canon law, which indeed those who consider it as of merely human origin must acknowledge to contain a constitution or organic system of polity not yet successfully rivalled in durability, solidity and elasticity.

Majoritas is defined to be that legal prerogative whereby one person is superior to another; from whence arise the obedience and reverence, or the reverence only, which are due from the lesser person to the greater;⁴ and the commentators insist on the necessity of that subordination which constitutes what is called hierarchy, adducing as examples the different celestial orders in the Church triumphant, and the construction of organic bodies in material nature;⁵ and we shall see that this is one of the immutable laws of civil society.

Barbosa enumerates four different causes of superiority (*majoritas*), that is to say—I. The prerogative of order, whereby a bishop is above a priest and a priest above a deacon; and the orders of subdeacon, acolyte, exorcist, lector and doorkeeper, are each superior to that which follows it. II. The prerogative of power or authority, which is called jurisdiction, according to which an archbishop is above a bishop, and a patriarch superior to an archbishop, though they are all equal in order as being of the order of bishops. III. The prerogative of seniority of age or of time, which confers a title to superior reverence among persons in other respects equal. IV. The rank derived from the dignity of the person by whom an order or office was conferred, namely, the Pope.⁶ To these Reiffenstuel adds the prerogative of consecration, whereby a bishop consecrated is superior to one elected to the office of bishop in the hierarchy of jurisdiction, but not yet consecrated;⁷ and Schmalzgrueber also mentions privilege granted to a particular see which gives its bishop rank above bishops in other respects equal; and he includes the prerogative of jurisdiction in the more comprehensive term of *excellencia dignitatis*, specifically mentioning the cardinals.⁸

Notwithstanding the slight differences of those high authorities, we find here a consistent and complete scheme of superiority and subor-

⁴ Reiffenstuel, *Jus Canon.* lib. 1, tit. 33, num. 2, 17; Schmalzgrueber, *Jus Eccles.* lib. 1, tit. 33, § 1, *De Majoritate*.

⁵ Reiffenstuel, *ubi sup.* num. 1; Barbosa, *Collectanea Doctorum*, tom. 1, p. 283, lib. 1, tit. 33, § 2.

⁶ Barbosa, *ubi sup.* § 3—8.

⁷ Reiffenstuel, *ubi sup.* num. 5.

⁸ Schmalzgrueber, *Jus Eccles.* *ubi sup.* num. 1, 5.

dination. We must next see the principle on which this machinery works. That principle is the obedience arising from superiority (*majoritas*), especially of jurisdiction, which obedience the lesser person owes to the greater. It consists, according to Hostiensis, in three points. I. Reverence to those to whom it is due. II. Performance and observance of the lawful commands or directions of superiors. III. Submission to the judicial authority of superiors, unless the subject is freed by an exception or appeal, or the superior himself is a party to the suit.¹ The remaining question is, how this principle operates, or to whom and from whom the duty of obedience is due. It includes reverence; but there may be superiority without jurisdiction; as, for instance, that which comes from seniority among equals. And obedience, properly speaking,² is due not by every one to every superior, but by each inferior (in this sense described by the technical term *subjectus*) to that superior who, by the laws of the Church, has authority over him. And, in the first place, obedience is due by the whole Roman Catholic Church to the jurisdiction of the Supreme Pontiff, in all those things which regard or affect Divine worship and the salvation of souls.³ For by Divine right he is the immediate pastor of the whole flock, with ordinary jurisdiction,⁴ and the visible source of all ecclesiastical jurisdiction.⁵ And this sovereign supreme plenitude of jurisdiction and authority constitutes the unity of the whole scheme. In the second place, obedience is due to the bishop from all subject to him within his diocese, in everything regarding the cure of souls.⁶ These are the two principal and necessary points of ecclesiastical polity, and the key of the system called the Hierarchy of Jurisdiction, which consists of a regular gradation of persons in a multitude of lines, all descending from the Holy See, the centre of unity, and increasing progressively in number as they pass through and radiate from the intermediate inferior centres of unity, that is to say, Patriarchs, Primate, and Metropolitans. The principle of obedience connects the persons forming each line together, according to the laws which regu-

¹ Schmalzgrueber, lib. 1, tit. 33, § 2, num. 13; Reiffenstuel, lib. 1, tit. 33, § 15, 16, 20.

² Obedientia duobus modis accipitur; priori modo largo et generaliter pro executione cujuscunque rei que potest eundem sub præcepto, que fit non ratione ipsius præcepti solum, sed ex quacunque alia intentione Posteriori vero modo accipitur specialiter pro executione præcepti expressi vel taciti, non ex quacunque intentione, sed ex eo solum quod præcipitur, et ita ejus formale objectum est præceptum superioris et illius voluntas cui formaliter aliquis intendit obedire, et hæc est propria et specialis obedientiæ virtus. Barbosa, ubi sup. num. 9, 10.

³ Schmalzgrueber, ubi sup. num. 14, p. 272.

⁴ Zallinger, Inst. Jur. Eccl. lib. 1; Decret. tit. 30, § 508, 510.

⁵ Bolgeni, L'Episcopato, tom. 2, p. 30.

⁶ Schmalzgrueber, ubi sup. num. 14, 2.

late that duty, and the place which every one holds. And all the different lines are bound together by the common obedience of the persons composing them to the one centre from whence they all spring; and their conjunction with that centre is strengthened by the intermediate points at which they are united.^p Again, the whole system is made the better to harmonize, by the principle of superiority and reverence between superiors and inferiors, even where no obedience is due, that is to say, between persons co-ordinate, though not equal in the same line, and unequal persons in different lines. In this place I have not included the Hierarchy of Order, which is defined to be the power granted by our Lord to His Apostles and their legitimate successors, to celebrate and distribute the Divine mysteries of religion in the Church;^q for order belongs rather to the pastoral care than to the power and frame of exterior governments,^r in which the Hierarchy of Jurisdiction consists.^s Zallinger, after drawing the distinction between the two Hierarchies, thus continues: "The Hierarchy of Order ascends from the lowest degree (*ostiarus* or doorkeeper) to the culminating point of the Priesthood (the Episcopal order); while that of Jurisdiction descends from the Supreme Pontificate to the last degree of those who have jurisdiction only *in foro interno*, either by office or delegation. As in order, a higher decree does not extinguish the lesser, but elevates it; so in jurisdiction, whoever is bishop is also eminently parish priest; the metropolitan is also bishop in his diocese; the primate is both metropolitan and diocesan bishop; the patriarch is primate, metropolitan and diocesan; and the Supreme Pontiff, the Universal Supreme and Ordinary Pastor, is also Patriarch of the West, Primate of Italy, Metropolitan of the Roman province, and Diocesan Bishop of Rome."^t

The reader has now before him a general skeleton map of the polity constituted and regulated by the Ecclesiastical Public Law of the Roman Catholic Church. And as that Church is not confined within any state, nation or territory, but universal, for the very reason that it has no limits,^u and it is constructed according to an organic law of unbroken jurisdiction and subordination, the same in every, even the

^p See Devoti, *Institutionum Juris. Canonici Tabulæ Synopticæ*, tab. 8, et seq.

^q Potestas a Christo suis apostolis eorumque successoribus legitimis tributa, ut Divina religionis mysteria in ecclesia celebrent atque distribuunt. Concil. Trident. sess. 23, c. 1, De Ord.

^r Zallinger, ubi sup. tit. 33, § 533, p. 157.

^s Potestas a Christo suis apostolis eorumque legitimis successoribus tributa, ut Christi fideles sibi subditos in rebus ecclesiasticis regant atque gubernent. Decretum Gratiani, pars 1, dist. 21, c. 2; Devoti, *Inst. Jur. Canon. Tabulæ Synopt.* tab. 8.

^t Zallinger, ubi sup. pp. 157, 158.

^u Devoti, *Inst. Jur. Canon.* tom. 1, Prolegom. § 12.

most remote, quarter of the habitable world, yet adapted to the wants of all mankind; we must conclude that this Ecclesiastical Public Law is not municipal, and that it is part of the general *Jus Gentium* and of the common scheme or economy by which the human race are governed under Divine Providence.

We will now proceed to consider the division of the world into nations and states, with reference to this Ecclesiastical Public Law, a subject on which depends the solution of divers questions of temporal Public Law and politics.

The last chapter has shown that this separation of mankind into sections or provinces is legally a secondary and subordinate institution, not affecting primary natural law, and arising as a consequence from the creation of the civil state. And so in the Pandects it is ranked, in a law of Hermogenianus, with matters of secondary natural law.*

A general analysis of human society in its civil or politic state resolves it into four different elements or stages of development. Each of these stages or conditions of man not only does not destroy, but confirms and strengthens that which precedes it. So we have seen that civil or politic society is natural society modified by the introduction of sovereign power.[†] And one effect of natural society is to produce a more perfect fulfilment of the primary natural law, (which regards man individually and apart from any institutions,[‡] such as that of property,) than could be obtained in the condition called by some writers the state of nature, though that condition is in reality a state contrary to nature.

St. Augustine makes three degrees or stages of human society, that is to say, the family, the city, and the world;[§] and this classification is valuable, because it includes the chief societies of men as they now exist. But for our present purpose we must add another element after the family, which is the first and most simple of all, and arises from the relations of husband and wife, parent and child, and master and servant;^{||} at least where the latter is not simply matter of contract of hire, but makes the servant part of the family of the master. The element to which I refer is sometimes called *anarchical* society, that of many families without any common head or government, but having in view their general security and interests.[¶] It arises out of the obligations of sociability among men without more, for those obligations are matter of

* L. 5, ff. De Just. et Jur.

† Burlamaqui, *Principes du Droit des Gens*, tom. 4, ch. 1, p. 15.

‡ Grot. Dr. de la G. liv. 1, ch. 1, § 10, numb. 4.

§ Div. August. De Civ. Dei, lib. 19, cap. 7.

|| Black. Com. vol. 1, ch. 14, p. 422, &c.; Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* lib. 2, cap. 2, *Societas conjugal*; cap. 3, *Societas parental*; cap. 4, *Societas herilis*.

¶ Zallinger, *ubi sup.* p. 401. This society must not be confounded with the false principle called *Socialism*. See Mill. *Polit. Econ.* vol. 1, p. 250.

natural law and therefore require no contract or compact to give them validity.

The next element of human society, as we now see it, is civil or politic society, created by the establishment of sovereign power, which terminates the independence of men without destroying natural society.⁴ Out of this establishment of politic or civil society arises (as we have seen) the division of mankind into states and nations, an institution which would be unnecessary for mere natural society, since every man might perform the obligations of sociability towards his neighbours or those with whom he had dealings, without any such divisions of men and territories, though the introduction of property, and the purposes of agriculture and occupation or habitation, would involve and require that of boundaries separating the lands belonging to different owners.*

Now let us see the bearing of these reflections on Ecclesiastical Public Law with reference to the subject which we are considering.

The Public Law of the Church does not directly apply to the mere insulated individual man, because it is a law of social existence, constituting a society or body politic. But when we go on from the individual to natural human society, we find a temporal condition of mankind, to which Ecclesiastical Public Law is immediately and naturally applicable. That law would add a further bond of social union, and a spiritual though exterior government to a state of simple association constituted by the rules of natural law. And nothing more would be required for the fulfilment of all the laws of man's existence on earth, if it were not for those circumstances of his nature which render the power of the civil magistracy necessary for the maintenance of the peace and order of society. Those circumstances we have considered as they are described by Domat, where he shows the state of society after the fall, and how God makes it to subsist by the four foundations of the order of society in its present state, that is to say, the natural knowledge of justice, the government of God over society, the authority which God gives to supreme powers, and the power of Religion.[†] And to these circumstances St. Augustine refers when he shows that the celestial city, so far as it exists on earth, requires that peace which belongs to the terrestrial city, *civitas terrena*, depending on temporal law and power.[‡] We may conclude that the state of nature, which consists of society without any other government than that of families, and is next in order of development to politic or civil society,[§] admits the applica-

⁴ Burlamaqui, *ubi sup.* p. 14.

* *Ex hoc jure gentium introducta bella: discreta gentes; regna condita; dominia distincta; agris termini positi.* Hermogenianus, l. 5, ff. De Just. et Jur.

† Domat, *Loix Civiles, Traité des Loix*, ch. 9.

‡ Div. August. De Civ. Dei, lib. 19, cap. 17.

§ Pufend. *Droit de la Nat. et des Gens*, l. 2, ch. 2, § 4.

tion of Ecclesiastical Public Law. In other words, the institution of civil or politic society is not a necessary constituent element of the constitution of the Universal Church. No analysis of that constitution would produce civil society, that is to say, *civitas*, or human society under temporal sovereignty. This shows why temporal sovereignty is collateral to the Catholic Church, and explains the declaration of our Lord, that *His kingdom is not of this world*, meaning that it is of a different origin, nature and order, in the economy of the world, from temporal kingdoms. And so St. Augustine observes that it is declared not that that kingdom is not in this world, but that it is not of this world.¹

The result to be deduced from these principles is, that as the division of the world into states and territories is a consequence of the institution of civil societies, which form the ultimate step of development of the social state; therefore Ecclesiastical Public Law is legally prior to that division of the earth. Therefore, Savigny speaks of Ecclesiastical Law as in contact with temporal Public Law, and not part of it, but a special independent law.² These views explained above are confirmed by the fact that all existing temporal sovereignties or states are more modern than that universal community, the Catholic Church.

It is immaterial to enter into the discussion whether this state of natural society, intermediate between the fictitious state of pure nature (which is contrary to nature) and civil society, existed by itself in point of fact. For it is comprised in civil society, and forms the second element, or stage of development, the family being the first, of that society. Thus we have seen in Burlamaqui that civil society does not destroy natural society.³ The meaning is, that the former leaves subsisting all the obligations and laws of the latter, and, indeed, gives them greater force and effect. We may therefore correctly look on natural society as a constituent element of the civil state or politic society, which was not created by any contract or act of individual will, but by a natural law of spontaneous development.⁴ And we find the state of natural society actually existing among independent nations in their relations with each other. It is indeed the basis of international law.⁵

¹ Devoti, Inst. Jur. Canon. lib. 3, § 9; Sctus. Johannes, xviii. v. 36; Div. August. tr. 115, in Johan. num. 2, Op. tom. 3, col. 792, edit. Ven. 1720.

² Savigny, Traité du Droit Rom. tom. 1, pp. 26, 27, edit. Paris, 1840.

³ Burlam. Principes du Droit de la Nat. et des Gens, tom. 4, pp. 14, 15, ed. Dupin.

⁴ Savigny, ubi sup. pp. 28—30.

⁵ *Ibid.* p. 31, § 11.

We must conclude that Ecclesiastical Public Law, primarily, regards mankind apart from their political distribution into states and nations governed by temporal sovereignty. If it were not so the Catholic Church would be an aggregate of civil states. And those politic communities are changed and dismembered, and their boundaries moved by conquest, and the variety of other causes of which we read in history.* Their principles are corporate individuality, independence, and extensive sovereignty within the respective territories of each. But the principle of the Church is unity combined with universality.

The division of states and territories is, however, by no means neglected by Ecclesiastical Public Law. Administrative and jurisdictional necessity, analogous to the cause which produced the civil divisions of the earth, gave rise to the ecclesiastical boundaries of patriarchates, provinces, dioceses, and, lastly, parishes; and the demarcation of these districts was determined in a great degree by physical, temporal, and political circumstances. And the very institution of a national synod shows that the Church has regard to the principle called nationality.⁸ Unity is, however, maintained by the fundamental rule of Ecclesiastical Public Law, that those to whom the cure of souls is assigned within those divisions, are admitted, not to the plenitude of jurisdiction, but only to a participation of solicitude and care with the Supreme Pontiff.⁹ Thus, though in a certain sense the episcopate is one, as St. Cyprian says, through the see of Peter,⁷ yet each bishop has a local compass of his authority, called a diocese,⁸ which is marked out, not to define a territory for purposes of dominion, as is the case with temporal states and territories, but simply that the pastoral care of one bishop may be distinguished, for practical purposes, from that of another. So a bishop's *see* is the Church where he is set;⁷ and from that Church he takes his name as bishop. So St. James was Bishop of Jerusalem, and Evodius, Bishop of Antioch,⁸ though they had no temporal or territorial right or title in those places. And the fact that ecclesiastical boundaries frequently coincide with

* Savigny, *ubi sup.* p. 30.

⁷ Devoti, *Inst. Jur. Canon.* tom. 1, Prolegom. cap. 3, § 41.

⁸ Gregory IV. speaking of the Roman Church, says, "*Quoniam sic vices suas aliis impartivit ecclesiis, ut in partem sint vocata sollicitudinis, non in plenitudinem potestatis.*" Bolgeni, *l'Episcopato*, tom. 2, pp. 41, 42. And St. Bernard, addressing Pope Eugenius, says, "*Alii in partem sollicitudinis, tu in plenitudinem potestatis vocatus es.*" *De Consid.* lib. 2, cap. 8.

⁷ Bolgeni, *l'Episcopato*, tom. 2, cap. 10, art. 3.

⁸ Hooker, *Eccles. Polit.* b. 7, § 8.

⁷ *Ibi.*

⁸ *Ibi*, § 5.

temporal territories, alters not the nature of the former, but is easily accounted for on historical and geographical reasons.

Ecclesiastical Public Law is brought into contact with the political divisions of the earth into nations and states, by the relations which must exist between the spiritual and temporal powers. Those relations arise from several causes. Ecclesiastical law has for its object the external acts of men;^{*} and it is a rule of civil conduct, directing the actions of the citizens of the commonwealth whereof it is the law, that is to say, the Catholic Church.[†] And the Church is a society distinct from the State, having its own magistrates, with exterior as well as interior jurisdiction and authority.[‡] Though the direct or immediate object of the temporal and that of the spiritual law are different, yet, as both relate to external things, they sometimes regulate the same things. And the temporal power in many instances supports and enforces the rules laid down by the Church. Hence arise those mixed matters, of which I have given a sketch in a former chapter, and which are subject to both laws. In some cases, indeed, there is a real conflict between the two laws—where the law of the State so contradicts the spiritual law as to make it impossible to obey both. Such was the law of Nebuchadnezzar commanding an idolatrous act. Such were the laws of some of the Roman Emperors who persecuted Christianity. And in other cases the conflict is only apparent, because it arises from the circumstance that the spiritual law commands in order to an ulterior object, while the temporal law regards a temporal purpose, and does not forbid what the former prescribes. And so the canons require many things beyond what the temporal powers deem sufficient for the outward order and secular welfare of society, because the direct object of the canons is beyond the present life.[§]

The relations of the Church with temporal laws, arising from these causes, introduce what may be called the municipal element into ecclesiastical jurisprudence, consisting in modifications of the mutable part of that system, calculated to suit the laws and customs of particular countries. Thus, in some countries, the civil power, by concession of the Holy See, participates in the election of persons to fill bishoprics. And ecclesiastical property is more or less affected by the temporal laws which thus modify the law of the Church. In Protes-

^{*} Suarez, *De Leg.* lib. 4, cap. 12, 13; *Decret. Gratian. Tract. de Pœnit.* c. 14, 31; *Can. Concil. Trident. sess. 24, De Reform. Matrim.* c. 1.

[†] Lancelot, *Inst. Jur. Canon.* lib. 1, tit. 1, § 1; Reiffenstuel, *Jus Canon. Præm.* § 3.

[‡] Devoti, *Inst. Jur. Canon.* lib. 3, tit. 1, § 2.

[§] Lancelot, *Inst. Jur. Canon.* lib. 1, § 1.

tant countries, where the Catholic Ecclesiastical Law is only tolerated by the secular power, and looked upon simply as the usages of a particular body, and consequently the Catholic Church is primarily subjected to the ordinary secular law of the land, many parts of the canon law are not in force, because they are not applicable to that state of things, and because the Courts of Law will allow the laws of the Church only that effect, as such, which they concede to the rules of an unincorporated society, which are not contrary to the temporal law. There are, moreover, concordats or agreements between the Holy See and divers governments, regulating the relations between the Church and the State, and granting certain privileges to the latter; and likewise privileges, not affecting doctrine, have been given to Churches of particular states or provinces in derogation to the ordinary rules of the Church.

All these things bring Ecclesiastical Public Law into contact with the political divisions of the earth. It remains to be seen by what legal constitutional principles those divisions and the laws and institutions of different states are prevented, on the one hand, from introducing an element of discord into the Church, and, on the other hand, how Ecclesiastical Public Law is sufficiently elastic to adapt itself to the exigencies of every place, and harmonize with every form of temporal polity.

The first of those principles is that which makes the Public Law of the Catholic Church not municipal but universal, as I have shown; and the second is, that, as we have seen, Ecclesiastical Public Law is legally anterior to the division of the world into nations and states, because it belongs to an element in the development of society, anterior to civil or politic society, that is to say, to natural society. The consequence is, that the Public Law of the Church is collateral to that of civil communities or states, and the one does not arise out of nor depend on the other, but each has its separate existence and province. So Ecclesiastical Public Law is independent of the municipal part or last step of the development of human society; and it appertains to the second, namely, natural society. Now natural society (which was not destroyed by politic or civil society) is universal and not municipal or belonging to different communities considered as such, but embraces all mankind; and this universality is one of the essential characteristics and fundamental principles of the constitution of the Church, or, in other words, of Ecclesiastical Public Law. These reflections show how it is that Ecclesiastical Public Law harmonizes not only with the primary natural law (which regards mankind as one undivided society), but with the division of the world into nations and

states, and their municipal institutions.^b The former is included in the constitutional law of both the Church and civil politic societies, while the latter spring out of civil society by development, and are therefore in unison with—though only collateral to—the organic system and laws of the Church. And Ecclesiastical Public Law preserves the principle of the unity of the human race in the economy of the world, for the very reason (among others) that it stands upon natural society,* which embraces the whole world, whatever may be the municipal polity of distinct communities, such as kingdoms or republics. All those communities in the civilized world are affected by that law in a greater or less degree, both internally and externally, even when they decline to clothe it with the sanction of the civil power, because it is an essential component part of the frame and economy of European society; and, if looked upon in this light, it is part of the general law of nations. Thus no one can read the history of European politics and diplomatic business without seeing the important place occupied by the affairs of the Church, and its relations both with society in general and with particular states, which relations are regulated by Ecclesiastical Public Law.

CHAPTER XV.

OF THE DIVERSITY OF LAWS AND POLITICAL INSTITUTIONS IN DIFFERENT COUNTRIES, AND OF THE CONFLICT OF LAWS.

Examination of the Diversity of Municipal Laws—Diversity of Forms of Government—Dispute as to the best Form of Government—Difference of Opinions—Absolute Monarchy—Opinion of Mariana and St. Thomas Aquinas—Doctrine of the Deposition of Tyrants—Divine Right of Kings—Indivisibility of the *Jus Majestatis*—Other Classes of arbitrary Matters—Analogies between Roman and Eastern Laws—The Conflict of Laws—First Principles—The Comity of Nations, and the Spirit of the *Conflict of Laws*.

THE two last chapters naturally lead us to a subject arising out of the political divisions of the world, namely, the *Conflict of Laws*. That important branch of jurisprudence contains many rules and decisions

^b Hæc ergo civitas cælestis dum peregrinatur in terra, ex omnibus gentibus cives evocat, atque in omnibus linguis peregrinam colligit societatem; non cumas quiddid in moribus, legibus, institutisque diversum est, quibus pax terrena vel conquiritur vel tenetur; nihil eorum rescindens, nec destruens, imo etiam servans ac sequens: quod licet diversum sit in diversis nationibus, ad unum tamen eundemque finem terrenæ pacis intenditur; si religionem qua unus summus et verus Deus colendus docetur, non impedit. Utitur ergo etiam cælestis civitas in hac sua peregrinatione pace terrena . . . Div. August. De Civ. Dei, lib. 19, cap. 17.

belonging exclusively to private law, because they relate to the rights of individuals considered in their private capacity. We will, therefore, examine its fundamental principles only under one aspect, in accordance with the plan and object of these Commentaries. We will explain how the conflict of laws arises, and show the origin and nature of the rules whereby cases of that kind are decided, viewing the subject as a consequence of the division of mankind into nations, and a necessary part of the universal jurisprudence which governs society. For it is impossible to confine the effects of municipal laws absolutely within the territories of each state; and, therefore, the laws of different countries have points of contact which arise from the general intercourse of mankind, and may be looked upon as a necessary part of the scheme of laws which regulate the world, divided as it is into independent nations and sovereignties.

A celebrated text of Gajus says, that all nations are governed partly by their own proper laws, and partly by laws common to all mankind.^c He then refers to the distinction which we have elaborately examined, between arbitrary or positive, and immutable or natural laws. That distinction is the principal cause of the diversity which exists between the laws of different countries. But the subject requires closer examination.

We have seen, that if the rules of natural law be considered, with reference to the way in which they present themselves to the understanding, they are of two sorts. Some are so evident, that their truth is clear to every reasonable mind, while others are not self-evident, but require to be demonstrated by showing their connection with the principles on which they depend.^d But even those of the former sort are not fully recognized, or have not the same extent or use in every municipal system of jurisprudence.^e Thus the law of inheritance comprises certain principles which cannot reasonably be denied or doubted, though, according to Grotius and Barbeyrac, even the succession of children to their parents' property is not matter of absolute and rigorous right, except so far as is necessary for their subsistence.^f So it is obvious, that the children of the deceased intestate are to be preferred to collaterals, and that his brothers and sisters should succeed before his cousins. Yet the law of inheritance varies greatly in different countries, and even in the same country with regard to different kinds of property. And though the succession of children is everywhere recog-

^c L. 9, ff. De Just. et Jur. And see Paulus, *ibid.* l. 11; Cujac. Oper. tom. 7, fol. 9, edit. Venet. Mutin.

^d Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 29.

^e *Ibid.* § 31.

^f Grot. *Droit de la G. et de la P.* l. 2, ch. 7, § 4, not.; Decretal. lib. 4, tit. 7, cap. 5; l. 1, § 3, ff. De Just. et Jur. (Ulpian.)

nized, in some the eldest exclude the others, while the custom of borough English gives the preference to the youngest. Again, the authority of the husband, as head of the family, in preference to his wife, is of natural and Divine law. But this principle has been more or less admitted and extended, and has produced a multitude of various municipal laws in different countries, according to their opinions, customs, and religious systems. It would be easy to multiply instances of variations in the way in which natural laws are carried into effect by municipal laws in different countries. And many examples can also be given of absurd and unjust laws used and approved even in highly civilized communities. Hence has arisen the opinion entertained by many, that there is no certainty in the principles of natural law. Thus the philosopher Carneades says, as Lactantius informs us, "Men have made laws for themselves as their particular interests required, and therefore laws are different, not only according to the diversity of manners, which vary in each nation, but even at different times in the same country. As for what is called natural law, it is a mere chimera."⁸ And Grotius maintains that natural law is a science capable of certainty, but, at the same time, he shows how differently it is understood among mankind.

If we pass from immutable or natural to arbitrary law, we shall find a still greater disagreement of legislators. We have seen that these arbitrary laws are of two sorts, one determining certain things in immutable law, which that law leaves uncertain, and the other regulating those which Domat calls arbitrary matters, consisting in artificial institutions and establishments intended for various purposes in civil society, which however are partly regulated by immutable laws.

The former sort of mutable or arbitrary laws necessarily differ according to opinions and circumstances, at different times and places, because their justice depends upon a principle of fitness which does not indicate any invariable point on which all mankind must agree, but leaves a certain margin within which the legislator may, without subverting any rule of equity, exercise his discretion. And this is so, though, as we have seen, these arbitrary laws are an essential part of jurisprudence, and frequently necessary to prevent an apparent clashing of two immutable laws, by determining the limits within which each should operate. And as in some countries certain parts of the law of nature are not recognised by the municipal law, so divers portions of this branch of arbitrary law are likewise omitted altogether. Thus, for instance, the civil law and the French code recognise the principle of natural law, that no man ought to injure another by buying anything of him at an absolutely inadequate price. Therefore an arbitrary law became ne-

⁸ Lactant. Instit. Divin. lib. 5, cap. 16, num. 3.

cessary in those two systems, which determined that a sale shall be voidable if the price given be below half the value of the property, and so reconciled that principle of immutable law with the freedom of commerce among men.^b But the law of England will not, in general, set aside a sale for mere inadequacy of price, and therefore no such arbitrary law is requisite therein.

The latter sort of arbitrary laws present a still greater variety of inconsistent enactments or customs in different countries. They have for their object to fulfil various uses for the benefit of the community, and are founded on reasons of utility or policy. We have seen that even these laws have a connexion with the two primary laws, because they have their foundation in some principle of the order of society, and ought to be framed for the welfare of man, which can only be attained by those two laws and their consequences. But the reasons of these arbitrary laws belong to the science of politics and economy rather than to jurisprudence, for the arbitrary matters of which Domat speaks are artificial and not natural, and must be very different in one country from what they are in another, because the position, the circumstances, the history, the opinions, and the characters, dispositions and wants of the people are different. Thus Montesquieu has shown how the spirit of arbitrary laws and institutions varies according to the form of the government. For instance, the law of inheritance, wills and settlements, should be favourable to the accumulation of property and the perpetuation of families in a country under an aristocracy or a government of which aristocracy is an element. But those institutions would be inconsistent with a democracy.

The very diversity of forms of government which we see all over the world affords another instance of these arbitrary matters and their varieties. The question what is the best form of civil government has often been investigated, but with no satisfactory result. It depends on varying principles, which (in the words of Hooker) reason *but probably* teaches to be fit and convenient;¹ and on that probability the opinions of the wisest men must differ. Burlamaqui declares, indeed, that this question is one of the most important and beautiful in political science. But Dupin says, that, on the contrary, it is one of the most useless, because its solution is impossible. Each form of government, he continues, whether simple or compound, may be the best in certain cases and countries, and the worst in others.² Tacitus and

^b Domat, *Loix Civiles, Traité des Loix*, ch. 11, § 8; *Cod. Civ.* 1674. According to the common maxim—*Hoc natura æquum est—neminem cum alterius detrimento fieri locupletiores*.

¹ Hooker, *Eccles. Polit.* b. 1, § 10.

² Burlamaqui, *Principes du Droit de la Nat. et des G.* edit. Dupin, tom. 4, p. 163.

Cicero hold the best government to be that which combines monarchy, aristocracy and democracy (though the former fears that it would be of brief duration); and this opinion¹ has in its favour many strong reasons, with the experience of our own country in later times, since the development of the democratic part of the British constitution. But the advocates of this compound form of polity have been unable to determine the relative power which its three elements should have, and the best mode of combining them. We find some statesmen arguing, with many reasons, that the preservation of the State requires resistance against the encroachments of democracy, while others rely for the welfare of this nation on the progress of democratic principles, which would overwhelm one of the three component parts of the constitution, and so render it in reality a democratic monarchy, thereby verifying the prediction of Tacitus, that the combination of monarchy, aristocracy and democracy could not be lasting. And this celebrated doctrine of mixed governments is so vague, that Cardinal Contarini defines the nature of the Venetian Republic in the terms in which Blackstone describes the English constitution, as fulfilling the conditions desired by Tacitus;² and though this opinion of the learned Venetian is combated by Bodinus, its accuracy in a certain sense is established by the judicious annotator Crasso.³ It is difficult to read the Federalist without being strongly impressed with the merits of a purely democratic republic, and also seeing the impossibility of such a government in every part of Europe: and though the American constitution has avoided the great defect of other federations, ancient and modern, which were sovereignties over sovereigns, and legislations, not for private individuals, but for communities in their political capacity,⁴ its federal is probably the most vulnerable part, from which dissolution is chiefly to be apprehended. Yet, having regard to the history and circumstances of the United States, no other than a federal constitution is possible there.

St. Thomas Aquinas, Mariana and many other great authorities, have argued with abundant ingenuity that the government of one man is the most excellent;⁵ but they both point out the dangers of

¹ Cicero, De Repub. lib. 1, ch. 29, 35, 45; Tacit. Ann. l. 4, c. 33. *Cunctas nationes et urbes, populus aut primores, aut singuli regunt: delecta ex his et consociata reipublice forma laudari facilius quam evenire, vel si evenit, haud diuturna esse potest.*

² Contarini, Della Repub. e Magistrati di Venetia, lib. 2, p. 52, &c.; Bla. Com. b. 1, Introd. § 2.

³ Nicolo Crasso, Annotazioni, annot. 38.

⁴ Kent, Comment. vol. 1, p. 217, part 2, § 10.

⁵ Div. Thom. Aquin. Opusc. De Regim. Princip. lib. 1, cap. 2, 5, 6; Mariana, De Rege, lib. 1, cap. 2.

absolute monarchy. St. Thomas holds that as the just government of one man is the best; so, if unjust, it is the worst sort of polity.¹ He lays it down that the power of a king should be so modified by the system of government of the kingdom as to prevent its degenerating into tyranny. And he gives countenance to the doctrine of Blackstone, that there are extreme cases in which a tyrant may lawfully be deposed.² His whole theory of government is favorable to the limitation of the regal authority by fundamental laws, and by principles prescribing its real objects, and the duties of the sovereign towards his people. And so St. Augustine, in a celebrated passage cited by Lord Chancellor Fortescue, defines a people to be a body of men joined together in society by consent of right, by an union of interests, and for promoting the common good;³ from whence the chancellor deduces the constitutional principles of the English monarchy. Mariana still more strongly opposes the simple form of absolute monarchy,⁴ which he describes as nearly verging upon tyranny.⁵ And he holds that taxes should be imposed with the consent of the people.⁶ He indeed pushes the opinion of St. Thomas with regard to the deposing of tyrants beyond the bounds of moral right.⁷ Again, we find Suarez distinctly laying it down that the regal authority is not, though the civil power of government in the abstract is, of Divine right, and arguing from thence that it may be subject to modifications and limitations arising from the will of the people.⁸ And he says, that, though monarchical government be the best, yet there is no principle of natural law requiring men to adopt it, and therefore the form of governments is a matter entirely arbitrary.⁹

If the doctrine of a simple monarchical power, absolute and indivisible, and prescribed by Divine right, had generally prevailed among

¹ Div. Thom. Aquin. Opusc. De Regim. Princip. lib. 1, cap. 3.

² Ibi, cap. 6. *Videtur autem magis contra tyrannorum sevitiam non prius præsumptione aliquorum, sed auctoritate publica procedendum.* And see Fortescue, De Landibus Legum Angliæ, cap. 9; Bla. Com. vol. 1, ch. 7, pp. 244, 245.

³ Div. Aug. De Civ. Dei, lib. 19, cap. 21; Fortesc. de Laud. cap. 8.

⁴ *Ad hæc constrictio legibus principatu nihil est melius, soluta nulla pestis gravior, et est argumentum oppressæ per tyrannidem reipublicæ cum contemptis legibus ad rectoris nutum vertitur.* Mariana, De Rege, lib. 1, cap. 2.

⁵ Ibi, p. 72; lib. 1, cap. 9.

⁶ Ibi, p. 70.

⁷ Ibi, cap. 6, 7.

⁸ Suarez, De Legib. lib. 3, cap. 4. And see Pufend. De Officio Hominis et Civis, lib. 2, cap. 6, § 14; Zallinger, Inst. Jur. Nat. et Eccles. Publ. tom. 1, lib. 3, cap. 2, § 204; Covarruvias, Op. tom. 1, p. 199.

⁹ Suarez, lib. 3, cap. 4, p. 206. . . . *pendet ergo tota hæc res ex humano consilio et arbitrio.*

Christian people, the result would have been some uniformity of political institutions. That theory was ancient in England,^b though not fully developed till the age of the Tudors and Stuarts. There is no trace of it in the Gloss on the celebrated text in the Pandects, *quod Principi placuit Legis habet vigorem*;^c and it belongs neither to the civil nor to the canon law. The doctrine of the indivisibility of the *jus Majestatis*, taught by many of the civilians,^d was the foundation of that of Sir George Mackenzie, who maintained that monarchy is, in its nature, absolute, and therefore incapable of limitations, all of which are inconsistent with that nature.* But that doctrine of indivisibility leads to no such conclusion, for, as Nicolò Crasso explains, the meaning of the civilians is that *Majestas*, or the sovereign power, is indivisible in regard to its intrinsic quality of supremacy and considered as a whole,—so that there cannot be two entire sovereign powers in one civil constitution. But it consists of divers distinct functions—such as those of making laws, of creating magistrates, and of peace and war.^f And so Grotius shows how its parts may be separated, according to the nature of their functions in the State.^g And the various distribution or combination of those functions or powers has produced a great number of different systems, theories, and schemes of government in the world.

All these authorities suffice to show that no definite theory, as to the form of monarchical government, has been generally taught or received among theologians or jurists, though monarchy is by its nature more susceptible of being reduced to simple general principles than any other sort of civil polity. And having regard to the variety of causes under which political institutions are formed, we may be surprised that there is not a greater diversity of governments in the world. Perhaps this may arise from the ease with which countries fall into the simple way of absolute monarchy, especially when political convulsions have produced a desire for the protection of a strong civil power, and a disgust for frequent changes, accompanied by insecurity of life, property and industry. This introduction of the regimen of simple monarchy is an instance of that which Modestinus

^b Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England*, pp. 23, 24.

^c L. 1. ff. De Constit. Princip.

^d Crasso, Annot. sopra Donato Giannotti e Gasparo Contarini, annot. 38, p. 484.

^e Mackenzie, *Jus Regium*, p. 39.

^f Crasso, ubi sup. pp. 485, 486; Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* tom. 1, lib. 3, cap. 2, § 205, p. 427.

^g Grot. *Droit de la G. et de la P.* (edit. Barbeyrac,) l. 1, ch. 3, § 17; Pufend. *Droit des Gens*, l. 7, ch. 4, § 1.

calls *jus quod necessitas constituit*,^b for it is an organic law, engendered by the operation of the necessity of human society, which cannot be maintained without some sufficient government, and therefore falls back on the authority of one supreme governor, when more complex systems of civil polity have proved unsuccessful. These reflections show how it is that republics and political constitutions analogous to them, easily terminate in despotic governments, either by the elevation of some successful chief or statesman to supreme power, or by the restoration of a monarchical regimen previously existing. For men naturally submit themselves to power in its simplest shape, either from hope or fear, and the authority of one is readily accepted, when that of many has been found uncertain, ineffectual, or vexatious. Thus history shows that anarchy is either prevented or rendered of short duration by that necessity referred to by Modestinus and Pomponius, which creates a remedy and so preserves human society, even where it seems on the point of succumbing to subversive forces and convulsions. And so circumstances and the wants of mankind produce various institutions and forms of Public Law, more or less adapted to particular times and places.

We come now to other classes of arbitrary matters. They are for the most part dictated or influenced by the spirit of the laws called fundamental or organic, which constitute the government of the community. They belong either to private or to Public Law. Of the former sort are various purely artificial modifications of private rights, chiefly regarding property, and institutions invented for private interests and purposes, or not directly nor principally intended for or relating to the public welfare. Of the latter there are two general kinds, which must be distinguished one from the other. The first comprehends the subordinate institutions, by means of which the peace of society is secured and the laws enforced. We call them subordinate to distinguish them from the form of the government or constitution of the state in its sovereign power. They comprise the appointment of punishments for offences, and all that the jurists include within the word *police*, that is to say, the actual enforcement of municipal laws and regulations. These matters are arbitrary, for though the moral guilt of an offence must not be neglected in determining the degree of severity with which it may be punished,¹ yet the means of preventing the commission of crimes, and of carrying laws into effect, must vary according to principles of policy and convenience,

^b L. 40, ff. De Legib. ; l. 2, § 9, ff. De Orig. Jur. ; Cujac. Oper. tom. 3, col. 373. *Evenit ut necesse esset reipublica per unum consuli.* L. 2, § 11, ff. De Orig. Jur.

¹ Grotius, Droit de la G. et de la P. liv. 2, c. 20, § 28.

having regard to the circumstances of the country, and the disposition and manners and condition of the people. And thus an act penal in one country, may be justly held innocent by the laws of another, where the particular law guarded by the penalty does not exist. The second kind of these arbitrary matters may be comprehended under the term of public economy. They regard the public revenue or general resources of the country, whether national or local, the public health, public education, public amusements, commerce, manufactures and trade, and the use of things, especially immovables, for a multitude of purposes involving or affecting the convenience and the interests of society. I do not include under either of these two general heads of arbitrary matters (police and public economy) any distinct mention of things regarding the public exercise of religion or religious worship, because their own distinctive character makes them belong to the Church, and not to the State, or, in other cases, places them within the province of belief, opinion and conscience. When they come in contact with temporal legislation, it is by reason of some temporal exterior incident or circumstance which brings the particular matter under one of the heads of temporal law above enumerated. With regard to the Catholic Church, this subject has been considered, when we examined mixed laws, partly temporal and partly ecclesiastical. And with respect to other religious systems, it does not require to be separately treated, because it is not distinguishable in principle from other matters of police and public economy.

This general view of arbitrary matters suffices to show the reasons of the diversity and variation of the laws whereby they are regulated. All arbitrary laws have some reason connected with the order of that society to which they belong. They are founded on a principle of utility, fitness, or convenience, or even necessity, which constitutes their justice, and is their spirit. And the arbitrary matters chiefly regulated by them are in like manner governed by the same principle and spirit. A similarity or resemblance between arbitrary laws of different countries is frequently observed, and has given rise to many, often unsound, theories and hypotheses. In some cases this is to be accounted for by historical reasons; but in others the resemblance arises from a uniformity in the construction and operations of the human mind, which makes the reason of different men come to the same conclusions. Thus there are resemblances between decisions of the Hindu Law and texts and principles of Justinian's Pandects. For by the Hindu Law, the attempt to alienate a man's whole estate, to the prejudice of his family, is treated as a symptom of insanity, and void on that ground, which was precisely the implication of the Roman Law in the case of an inofficious

testament.¹ Katyayana lays down the principle of the Civil Law as to priority of hypothecs—*qui prior est tempore potior est jure*—and one of the heads of the Law of *Stellionate*.¹ Vrihaspati decides a case between two mortgagees of the same field, on the principle of *uti possidetis,—possessor potior est.*^m Manu declares all acts void which are done by force, according to the doctrine of Javolenus in the *Pandects*. And the Hindu Commentators support the validity of a legal forced sale made by authority of the king, by resorting to a fiction of consent, analogous to Trebonian's error concerning obligations *quasi ex contractu*.ⁿ And Kúlluka Bhatta shows the correct reason of the decision, in accordance with the doctrine of the Civil Law, that lawful force does not render an act void in law. By the Hindu Law, rights of property cannot be destroyed without the assent of the owner. And so Pomponius says—*quod nostrum est sine nostro facto ad alium transferri non potest.*^o Several of these decisions are part of a curious disquisition on property in land, which distinguishes the usufructuary right from the direct right of the king in regard to revenue; and the important principle of the Civil Law is there laid down, that a full right of property prevents a concurrent property in the same thing, so that two persons cannot possess the whole of the same thing; from whence comes the rule—*meum amplius meum fieri nequit.*^p Examples of the same kind may be found in the Mahometan Law. Thus the doctors of all the Mahometan sects agree with the Roman Law as to the shortest period of gestation.^q The Mahometan Law holds that dominion on property is transferred, not by contract, but by delivery.^r The institution of monarchy affords an instance of resemblance between the positive laws of countries who have not derived it one from the other. The new system introduced by statute 15 & 16 Vict. c. 76, which abolishes forms of action, resembles the change in the Roman Law by the Emperors Constantine, and Theodosius and Valentinian.^s And the more simple modes of procedure which the legislature of this country has introduced are analogous to the Canon Law. So the amalgamation of Common Law and Equity together can only be carried into effect by the same sort of means by which the Civil and

¹ Strange, *Elem. of Hindu Law*, vol. 1, p. 18; Colebrooke, *Dig.* vol. 2, p. 118.

¹ Colebrooke, *Dig. of Hindu Law*, vol. 1, pp. 209, 211, 212.

^m L. 15, *Cod. De rei vindic.*; l. 72, ff. *De rei vindic.*; l. 9, § 4, ff. *De Publiciana Act.*; l. 14, ff. *Qui potiores in pign.*

ⁿ Colebrooke, *ibid.*, pp. 458, 477; L. 116, ff. *De Reg. Jur.*

^o Colebrooke, *ibid.*, pp. 462, 475; L. 11, ff. *De Reg. Jur.*

^p Colebr. *ibid.*, p. 463; L. 5, § 15, ff. *De Pignorat. Act.*; l. 45, ff. *De Reg. Jur.*

^q Baillie, *Moohummudan Law of Inheritance*, p. 156. Six months.

^r Hamilton, *Hedaya*, vol. 2, p. 454.

^s L. 1, 2, *Cod. De Formul. et Impetrat.*

Prætorian Laws were made into one system. Lord Mansfield, who first conceived this plan (and, like other men whose genius is in advance of their times, was violently assailed), no doubt saw that the English Law must follow the same course of improvement as the Roman Law. But the movement among the learned in favour of consolidating the two systems affords an instance of the analogy of the history of jurisprudence in different countries,—if it be compared with the relation between the Prætorian and Civil Law in the reign of the Emperor Hadrian, when Salvius Julianus compiled the Perpetual Edict, the model of the Pandects. This historical comparison seems to suggest the compilation of a code containing the whole equitable jurisprudence of the country, which, at a more advanced stage of the progress of the English Law, would become the basis of a general digest. Thus the evil which, as Savigny remarks, is incident to codes, would be avoided, namely, their fixing the jurisprudence of a country so as to prevent its progressive development.¹ And this observation points out a question which the advocates of codification have not yet maturely considered, that is to say, whether the Law of England has reached such a degree of maturity as to be ready for conversion into a code including its whole system. To codify the law while in a state of transition and formation would be a most serious error. The scientific elements of the law would be blighted, its faults perpetuated, and its progress towards perfection stopped. But this objection does not apply to the wise measure of compiling the statute law into a separate code, which seems to have been adopted on the example of Justinian, nor to that of digesting the Criminal Law into one statute. Those works, when completed, will probably become the text of Commentaries, bringing historical learning and scientific principles to bear on the whole body of statute law, which has hitherto been very much neglected, partly on account of its enormous bulk and confusion, which seemed to defy all systematic investigation and exposition.² The cultivation of this branch of legal science cannot fail to exercise a most beneficial influence on the progress of the Common Law, and thereby prepare the way to the formation of a general *Corpus Juris*. And the attention of Government and Parliament will at the same time be called by the labours of the Commissioners to the defective state of the machinery and form of legislation in this country. It will become more and more evident that two numerous and independent assemblies

¹ Savigny, *Traité du Droit Rom.* tom. 1, p. 45.

² The system of codification pursued by the canonists well deserves attention. All the compilations subsequent to the Decretals are arranged according to the classification in that Code. This method facilitates the reference of the more recent to the older law, and preserves the history of its changes.

of legislators require the aid of some permanent board or council to carry their intentions into effect, by preparing or revising bills; reporting as to the way in which particular clauses would operate, having regard to former statutes and the decisions of the courts; and showing by what language the object for which the bill is intended can best be attained. And it seems difficult to conceive that the process of digesting the statutes can fail to show the absurdity of recording a statute on the Rolls of Parliament in one continuous sentence, without break or stops; and the advantage of dividing the long and involved clauses of Acts of Parliament into short and clear articles. But we must return from this digression.

The necessary limits of these Commentaries prevent our entering into a full inquiry concerning the causes of the diversity of laws in various countries (a subject capable of being classified and reduced to scientific principles, and pregnant with important results for politics and legislation), but we have shown the chief features of that interesting problem, never thoroughly investigated as it deserves, and more agreeably than profoundly treated by Montesquieu in his *Spirit of Laws*. That distinguished jurist thus sketches the matter of which we have taken a general view:—"Generally speaking, the law is human reason governing the nations of the earth; and the political and civil laws of each nation are the particular cases to which that reason applies." He here looks on law in the same light as we have seen that Cardinal Contarini does, as an abstract principle of reason,^{*} converted into a rule of civil action. He continues:—"These laws should be so proper to the people for whom they were made,[†] that it is a great chance where the laws of one country are suitable to another. They must have regard and relation to the principle of the government established or to be established, whether they form that government, as is the case with politic laws, or they maintain it as civil laws do.

"They must also be relative to the physical circumstances of the country, its climate, the quality of the soil, its situation, its extent, and the mode of life and subsistence of the people. They must have reference to the degree of liberty which the constitution of the country can allow, the religion of the inhabitants, their inclinations, their wealth, their numbers, their commerce, their manners, customs and morals. The laws also have relations with each other, with their origin, with the objects of the legislator, and the order of things on which they are established. In all these points of view they should be considered. That I undertake to do in this work. I will examine all these

^{*} Contarini, *Della Repub. e Magistrati de Venetia*, p. 22.

[†] Montesquieu here speaks of positive laws. See *Gaius*, l. 9, ff. *De Just. et Jure*.

relations. They constitute together what is called—the *SPIRIT OF LAWS.*"[†]

So many and such important causes as these would produce a diversity of laws highly injurious to the general intercourse of mankind, if it were not for the fact that, as Gajus says, all countries which use laws and morals are partly governed by laws common to all men.[‡] And here we see the effect of the unity of jurisprudence, viewed as an entire system, on the government of the world. The causes of that unity have been fully investigated in the preceding chapters. If we look upon it with reference to the diversity of municipal laws, in each political division of the world, we cannot fail to see its necessity to preserve harmony and consistency in the economy of human society. And any community neglecting this principle loses ground in civilization, and becomes comparatively more or less insulated. The reason is, that (as we have shown) the division of the world into nations and states is a secondary subordinate institution, and therefore municipal laws cannot neglect or injure the immutable laws common to all mankind, without breaking the harmony of that general system of government which God has appointed for the whole world, and thereby placing the community using such municipal laws in a state of separation or political schism. Thus there is always a difficulty in treating and holding intercourse with nations whose municipal laws are barbarous and unjust, and who therefore do not fall in with the systems of jurisprudence recognised and acted upon by civilised countries as their practical standard of justice and injustice. Not only such bad laws must be injurious to the internal welfare of the country considered by itself, but they derange, so far as they extend, the general economy of government in the world, which is framed on certain principles universally applicable as a rule for the actions or conduct of men, and springing from the two primary laws.

These reflections lead us to consider the Conflict of Laws; a subject necessary for comprehending the effect of municipal laws on human society in general. We have to examine, first, how the municipal laws of one country come in contact with those of other countries; and secondly, what is the effect of such contact where those laws are contradictory, and therefore conflicting.

The root of the first of these two important problems in Public Law is the principle, already laid down, that the introduction of civil society did not destroy or supersede natural society. Natural society is, as we have seen, not municipal but universal. And civil society is natural

[†] Montesquieu, *Esprit des Loix*, liv. 1, ch. 3.

[‡] L. 9, ff. *De Just. et Jur.*

society modified by the introduction of the sovereign power.^a From this principle arises what is called the *comity of nations*. If it were otherwise, the institution of civil societies would confine the legal relations of men to the circle of each civil society, in all that does not belong to mere primary natural law. And thus the effects of municipal laws would be absolutely confined within the limits of the states to which they belong. We shall see that this is not so.

But, on the other hand, it is an important rule that each temporal sovereign power is exclusive, within its own territorial limits, of other temporal powers. Several texts of the Pandects are cited on this position, and two of them have become common maxims. *Extra territorium jus dicenti impune non paretur. Pari in parem nullum competit imperium.*^b And the laws made by a sovereign have, strictly speaking, no force or authority except within the limits of his dominions.^c This position is a consequence of the definition, given by Grotius, of the sovereign power, which he describes as a power, the acts of which are independent of and cannot be annulled or reversed by any other human power.^d For it must follow from thence, that the civil laws of any country, considered as a rule of civil conduct prescribed by the sovereign power, are not hindring within the territories of any other independent country. The same conclusion arises from the equality of nations,^e and from the principle, explained above, of the indivisibility of the sovereign power. These doctrines, taken by themselves, would lead to the conclusion that there could be no conflict between the laws of independent states, for the courts of each country would refuse to apply the laws of any other to any case within their jurisdiction, and would decide exclusively according to their own municipal law. The only question would be, whether the subject matter was within the jurisdiction of the court, and if that question were decided in the affirmative, the municipal law of the state to which the court belonged would always exclusively operate. This is the general rule.^f We have now to examine the reasons why it is subject to exceptions.

Boullenois, after saying that on strict legal principle no law has force and authority beyond the territory of the sovereign who made it, adds,

^a Burlamaqui, *Droit de la Nat. et des Gens*, tom. 4, pp. 14, 15.

^b L. ult. ff. *De Jurisdic.*; l. 4, ff. *De recept. qui arbitr. receper.*; l. 13, § 4, ff. *ad Senatuse. Trebell.*

^c Boullenois, *Traité des Statuts Princ. Gener.* 6, p. 4.

^d Grot. *Droit de la G. et de la P.* l. 1, ch. 3, § 7; Cacherani *Decisiones*, decia. 88, § 17; Bracton, l. 1, c. 8.

^e Vattel, *Droit des Gens, Prelim.* § 15—20.

^f *Ibid.* l. 2, ch. 7, § 84, 85.

that the necessity of the public and general advantage of nations has caused certain exceptions in what regards civil intercourse and commerce.^a These exceptions are *jus quod necessitas constituit*.^b They depend on several important principles of Public Law, from whence we shall see their reasons.

Although the laws of a nation have no direct binding force or effect except on persons within its own territories, yet every nation has a right to bind its own subjects by its own laws in every place where they may be.^c Thus the law of England adopts the maxim, *nemo potest exuere patriam*; and an Englishman, who removes to France or to China, owes the same allegiance to the British crown there as at home, however long his stay in foreign parts may be prolonged.^d This doctrine does not agree with that of Tryphoninus, Pomponius, and Florentinus, and of some modern jurists^e to which it is an exception. Their reason is, that a man may throw off his citizenship and betake himself to another country on the same legal principles (and subject to the same restrictions) on which he may dissolve a partnership.^f This, however, is a matter depending on the Public Law of each particular country.

Analogous to the maxim *nemo potest exuere patriam*, is the principle that the municipal law of a country may follow its subject abroad and render invalid an act done by him in a foreign country. Thus it was decided by the House of Lords in the *Sussex Peerage case*, that the Royal Marriage Act, 12 Geo. III. c. 11, extends to invalidate all marriages contracted in violation thereof, wherever solemnized, whether within the realm or without; the act rendering the party incapable of contracting marriage otherwise than according to its provisions.^g The reason of this is that when the municipal law of a given state makes an act of its own subjects absolutely illegal and void, that act is void without reference to the place where it is performed. If it were not so, the law would be easily evaded, and the permission of the law of one country would defeat the prohibition of that of another. Thus it has been held that a marriage once celebrated between British subjects in an English domicile cannot be dissolved under the laws of a foreign country to which the parties may temporarily remove;^h because by the

^a Boullenois, *Traité des Stat. Princ. Gen.* 6, p. 4.

^b L. 40, ff. De Legib.

^c Story, *Conflict of Laws*, § 21.

^d Bla. Com. vol. 1, pp. 369, 370; Foster, *Crown Law*, 184.

^e L. 12, § 9, ff. De Captiv. et Postlimin.; l. 5, ibi; l. 26, ibi; Vattel, *Droit des Gens*, l. 1, c. 19, § 220—228; Lampredi, *Diritto Publ.* vol. 3, p. 196.

^f L. 65, § 5, ff. Pro Socio; Grot. *Droit de la G.* lib. 2, cap. 5, § 29.

^g 11 Clk. & Finel. p. 85; Voet ad Pand. lib. 1, tit. 4, pars 2, De Stat. § 9.

^h Story, *Conflict of Laws*, § 86, 88; *Lolley's case*, 1 Russ. & Ry. 236.

law of England marriage is indissoluble, although marriages are under particular circumstances dissolved by the transcendent power of Parliament. This is a consequence of the general principle of the exclusive sovereignty of laws within their own territory, which does not allow a subject to resort to a foreign jurisdiction in order to disobey and make of no effect the law of his own country.

We see here an instance of the way in which the laws of different countries come in contact with each other; and this occurs in a variety of other cases, which may, however, be reduced to a few general heads. The first and most obvious is that of foreigners, or, as they are sometimes called, aliens or strangers, and all questions of *status* and the rights arising therefrom. The second is that of contracts and other legal acts or wrongful acts entered into and performed or committed in one country, and intended to take effect partly or wholly, or otherwise producing rights and obligations or other effects in another. The third regards foreign judgments or judicial remedies, that is to say, judgments pronounced in one country, but which cannot have entire effect without being enforced or acted upon in another. In all these cases the laws of more countries than one include within their intention scope and spirit some common subject matter. And where those laws differ, there is what jurists call a conflict of laws; and then the question arises which law is to prevail, or which part of the matter is to be governed by one law, and which by another?

Nations reciprocally allow each other's laws to have effect within their territories so far as may be without injury or inconvenience to themselves. And for mutual and common advantage it has been received in the law of nations, that one country should permit the laws of another to have validity in its territories.^p This permission is called *comitas gentium*, the comity of nations. We have now to examine its reasons or grounds.

We have seen that the constitution of civil society, by the formation of different sovereign states and nations, did not extinguish natural society embracing all mankind, but added to it a new element, that of supreme civil or sovereign power, with all the consequences of that institution. The relation of independent nations towards each other is therefore that of natural as contradistinguished from civil society. It follows, that as a nation owes to every other nation what man owes to man, we may lay down the principle that a state owes to another state that which it owes to itself; so far as its assistance is really needed and can be given without injury to or neglect of its own interests.^q This doctrine arises from the duty of sociability springing from the second of the two primary laws. Therefore the term comity must not

^p Huber, *Jus Publ. Univers.* lib. 3, cap. 8, § 7.

^q Vattel, *Droit des Gens*, lib. 2, cb. 1, § 3.

be understood as meaning mere courtesy. No doubt, however, every nation must be the final judge for itself, not only of the nature and extent of this duty, but of the occasions on which its exercise may be justly asked. And there is no sufficient ground for saying that any foreign nation has a right to require the recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or otherwise impolitic or unjust.¹ The equality of sovereign states affords a proof of that doctrine. *Pari in parem nullum competit imperium.*² But though every nation must judge for itself what is its true duty in administering justice in its own tribunals,³ yet no nation can altogether shut its eyes to foreign municipal laws, without violating the system of jurisprudence which regulates the mutual intercourse between civilized nations. "The true foundation," as Mr. Justice Story observes, "on which the administration of international law must rest, is, that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconveniences which would result from a contrary doctrine, and from a sort of moral necessity to do justice in order that justice may be done to us in return. This is the ground on which Rodenburg puts it."⁴ The American jurist states this proposition too generally, (for mutual interest and utility are not the true foundation of international law,) but it is correct if it be confined to the matter now under consideration, as indeed it is by Rodenburg. Thus President Bouhier says, "It must in the first place be remembered, that, though the rule is for the restriction of local customs within their territorial limits, their extension has nevertheless been admitted in favour of public utility, and sometimes even through a sort of necessity. Thus when neighbouring countries have allowed that extension, it is not that they have become subject to a foreign statute. It is only because they have found their own interest and advantage in procuring for their own statutes, in similar cases, the same advantages within neighbouring districts. We may therefore say that this extension of laws is based upon a species of the law of nations, and of fitness, by virtue of which different nations have tacitly concurred to allow this extension, wherever common equity and utility require it, excepting where the municipal law, to which the extension of a foreign law is asked, contains a prohibitive disposition."⁵

¹ Story, Conflict of Laws, § 32, p. 38.

² Voet ad Pand. lib. 1, tit. 4, pars 2, De Statutis, § 5.

³ Story, Conflict of Laws, § 34, p. 39; Kent, Comment. vol. 2, lect. 39, p. 457.

⁴ Story, Conflict of Laws, § 35; Rodenburg, De Stat. Diversit. tit. 1, c. 3, § 4.

⁵ Story, ibi; Bouhier, Coutume de Bourgogne, ch. 23, § 62, 63, p. 457; 11 Clk. & Fin. 85.

These reflections show the grounds and nature of the comity of nations by which questions arising from the conflict of laws are decided. As every independent community will judge for itself how far the *comitas inter gentes* is to be permitted to interfere with its domestic interests and policy,⁷ the decision of particular cases of conflict is matter of municipal law. Yet there are certain principles of jurisprudence on this subject, more or less universally received and acted upon by civilized nations. The reason of this is, that, as we have shown, the division of mankind into nations and states is an arbitrary and subordinate institution, from which arises the conflict between laws made by independent supreme powers, and the *comitis gentium*; for if there were no such division, one sovereign authority would exist in the whole world, which would prescribe the limits, and reconcile the differences of local laws, and no *comitas gentium* would be needed. It follows from this character of the division of nations, which belongs to the arbitrary part of Public Law, that there are certain principles of jurisprudence anterior to that institution, and appertaining to the general social state of mankind. Their reasons are traced directly or indirectly to the two primary laws, and they serve to obviate certain evils which would otherwise arise from the division of the world into separate states, and which are seen more or less perniciously developed, according as those principles are neglected. They fill a necessary space in the economy of the laws whereby mankind are governed, because they are required to regulate the intercourse between citizens of different countries, and so promote the welfare of the general human community. A few reflections will show clearly what part the *comitas gentium* has in universal jurisprudence, and its province and operation in the general government of the world. Municipal laws must be looked upon under two aspects. First, they are a rule of civil conduct, prescribed by the sovereign power of the State to its subjects, for the exclusive regulation and government of the particular community to which they belong. This is the primary use of municipal laws, considered as such. Secondly, municipal laws are to be considered with reference to this proposition, that mankind in general are governed by the municipal laws of all the particular communities into which they are divided. Some of those municipal laws are, or ought to be, common to all civilized communities, while others are peculiar to a country or place.* The former are direct, and the latter are indirect consequences of the two primary laws, as we have already shown. It follows from these positions, and from what we have said on the nature and spirit of laws, that all the laws in civil society, taken together as

⁷ Kent, Comment. vol. 2, lect. 39, p. 457.

* L. 9, ff. De Just. et Jur.

a whole, comprehending all nations, have a common general purpose, which is that of civil society itself. Where the municipal laws of different communities agree, this common purpose is evident, and naturally results from their operation. But a difficulty arises when laws of one country are opposed to those of another, in cases in which such inconsistent laws come in contact with each other. In those cases there is a want of harmony in the system and working of general civil society, because two inconsistent laws cannot both take effect on the same subject-matter, and on the other hand the foreign laws cannot be rejected without breaking the continuity of human society which extends to all mankind, and so interrupting the intercourse and commerce of the world. To deal with such cases, and prevent those inconveniences, is the use and object of the *comitas gentium*. And here we also see the spirit of that branch of jurisprudence called the Conflict of Laws. That subject will be further considered in the next chapter.

CHAPTER XVI.

THE CONFLICT OF LAWS.

Personal Laws as contradistinguished from Territorial Laws—Laws of British India—Concurrent Systems of Jurisprudence—Municipal Conflict of Laws—General Rules regarding the Conflict of Laws—Real and Personal Statutes—The Comity of Nations—Lex Loci Rei Sitæ—Domicil—Rule as to Movables—Jurisprudence as to Personal Statutes—Status—Conflict of Laws regarding Marriage, and its Consequences—Divorce—Effects of Marriage as to Property—Conflict of Laws regarding the Jurisdiction of Courts and Legal Remedies—Foreigners.

BEFORE we pursue the subject commenced in the preceding chapter, some notice must be taken of the condition of civil rights denominated personal rights or personal laws, as contradistinguished from territorial laws.

The general principle of modern times is, that the territory determines the law, and the law of the territory regulates the property and contracts of all who inhabit the country. In this respect citizens differ little from foreigners, and national origin has no influence.* We denote this state of things by the common expression the *law of the land*, meaning the territorial law. A different system existed in the

* Savigny, *Hist. du Droit Rom.* tom. 1, p. 89 (trad. de Guenoux).

middle ages. "When," says Savigny, "the Goths, the Burgundians, the Franks, and the Lombards, founded new states, in which the Romans retained neither dominion nor influence; those barbarians had the choice of treating the vanquished in different ways. They might have destroyed the conquered nation by exterminating or enslaving all the free men. They might have incorporated it with themselves, imposing on it the manners, the constitution, and the laws of Germany. Neither of these events occurred; for though a multitude of Romans were killed, driven away or reduced to slavery, these acts of severity were directed against individuals, and not against the mass of the nation on any uniform plan. On the contrary, mingled together within the same territory, the two nations preserved distinct manners and laws, which engendered that sort of civil law called *personal right* (*jus*), or *personal law*, as opposed to *territorial law*.^b" Thus, in the middle ages, as the learned writer proceeds to show, the Roman and the Lombard, though inhabiting the same country, lived each according to his own law. And so it was with the Franks, the Burgundians, and the Goths. And Savigny cites a passage from a letter of Agobardus to Louis le Debonnaire, stating that, "We often see five persons conversing together, not one of whom obeys the same laws." Montesquieu is of opinion that the system of personal laws existed among the Germanic tribes.^c Savigny, however, establishes that it did not commence until nations were more mingled together. Thus the system of personal laws in Germanic states, founded on Roman soil, must have comprised at first only two sorts of law, the Roman and that of the conquering tribe, to the exclusion of the law of the other German tribes. But if that same state extended its domination over another tribe, it admitted the national law of the latter as the Roman Law had been admitted, and the conquered tribe in its turn recognized all the sorts of law in force within the conquering state. The historical results would be as follows, and they are confirmed by facts. For northern France, the Roman Law would have been admitted alone, beside the Franc Law. Later, when the Carolingians had subjugated the Visigoths, the Burgundians, the Germans, the Bavarians and the Saxons, the laws of these various tribes would have been recognized in the Franc empire, of which they formed parts. But as Italy never was a portion of the Franc empire, the Lombard Law would have been always excluded from that empire. As for Italy, the Roman Law would have stood alone in force, beside the Lombard Law, under the Lombard kings, and the Franks would have introduced by their conquests the different laws which they had

^b Savigny, *Hist. du Droit Rom.* tom. 1. p. 89 (trad. de Guenoux).

^c Montesq. *Esprit des Loix*, liv. 28, ch. 2.

previously themselves recognized. Savigny shows that historical facts and documents are entirely in accordance with these results,^d which he deduced and inferred from the nature of things. We may therefore safely conclude that conquest was the origin of personal laws in the middle ages.

The general rule was, that each individual followed the law of his own nation. To this there were several exceptions. Women followed the law of their husbands, though on becoming widows they returned to that of their origin. Churches, considered as juridical persons, followed the Roman Law, and so it was with the clergy, and both were considered as Romans.^e This, no doubt, arose from the Supremacy of the Holy See, to which we may add the other causes indicated by Savigny, namely, ancient customs, the adaptation of the Roman Law to ecclesiastical matters for which the laws of the barbarians were unfit, and the privileges of the clergy arising from the Roman Law.

Another remarkable instance of personal laws exists in India, in accordance with a very ancient principle of Hindu Public Law. The *Manava-Dharma-Sastra*, or *Laws of Manou*, a book supposed to have been written 1300 years before the Christian era,^f contains, after a metaphysical cosmogony, the laws and duties of the four primitive castes, and the mixed castes. In the part regarding the duty of the royal and military caste, or *Kshatriyas*, it is laid down, that after a king has conquered a country, he ought to maintain the laws of the conquered nation as they have been promulgated.^g This precept is in accordance with the doctrine of the English Law, that conquest does not annul the laws of the conquered country; and a conquered or ceded country retains its own laws, though the king may alter them by his prerogative.^h In conformity with these principles, Warren Hastings's plan for the administration of justice, adopted in 1772, especially reserved their own laws to the natives of India. The first regulation of the governor general in council, in 1780, contains the same provisions. By sect. 27 of this regulation it is enacted, "that in all suits regarding inheritances, marriage, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentoos, shall be invariably adhered to." This section was re-enacted in the following

^d Savigny, *Hist. du Droit Rom.* tom. 1, pp. 91, 92, &c.

^e *Ibi*, p. 103—105.

^f *Loisieur Deslongchamps*, *Lois de Manou*, Pref. p. v.

^g *Ibi*, liv. 7, § 203, p. 244; Sir W. Jones, *Inst. of Hindu Law*, art. 203.

^h *Bla. Com. Introd.* p. 108; *Calvin's case*, 7 Rep. 17; Clark, *Colonial Law*, p. 4; *Hall v. Campbell*, Cowp. 210; *Show. Parl. Cas.* 31; Barge, *Comment.* vol. 1, pp. 31, 32.

year in the revised code, with the addition of the word succession. By stat. 21 Geo. III. c. 70, it is enacted, that, in disputes between the native inhabitants of Calcutta, their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentús by the laws and usages of Gentús; and where only one of the parties shall be a Mahomedan or Gentú, by the laws and usages of the defendant.¹ This last provision seems founded on the reason of the Civil Law maxim—*actor sequitur forum rei*.² Sect. 18 of the same statute preserved to the natives their laws and customs, enacting, that, in order that regard should be had to the civil and religious usages of the said natives, the rights and authorities of families and masters of families, according as the same might have been exercised by the Gentú or Mahomedan Law, shall be preserved to them respectively within their said families; nor shall any acts done in consequence of the rule and law of caste, respecting the members of the said families only, be held and adjudged a crime, although the same may not be held justifiable by the law of England.³ That declaratory provision agrees with the doctrine of Lord Mansfield, who denies the position of Lord Coke, that laws contrary to the Christian religion are ipso facto abrogated by conquest.⁴ The reservation of the native laws of Hindus and Mahomedans was extended to Madras and Bombay by sections 12 and 13 of stat. 37 Geo. III. c. 142, in 1797. The regulation law is in accordance with these statutes.⁵ This sketch suffices for our purpose to show the existence in British India of three sorts of laws, two for the natives, and one, the English Law, for Europeans. The preservation of the Hindu Law after the Mahomedan conquest is a remarkable fact, as the Mahomedan Law has no provision resembling the passage in the Laws of Manou mentioned above, but, on the contrary, does not tolerate the laws of a conquered nation.

There is not, properly speaking, any conflict of laws between the personal laws existing in that state of civil right which we have just described; that is to say, there is no conflict to be regulated by comity. For the relations between the different laws are determined by the sovereign power to which they are all equally subject. Thus we have seen that, by statute and regulations in force in India, the law of the

¹ Morley, Digest of Indian Cases, Introd. pp. 169, 170.

² Vattel, Droit des Gens, l. 2, ch. 8, § 103; l. 2, Cod. De Jurisdic. omnium judicum. l. 5, eod. tit.; l. 3, Cod. ubi in rem actio exerceri. debent.

³ Ibi, p. 171.

⁴ Hall v. Campbell, Cowp. 210; Calvin's case, 7 Rep. 34.

⁵ Morley, Dig. Introd. p. 171.

defendant has the preference, where one party is a Mahomedan and the other a Hindu. The same conclusion follows from the fact that the system of personal laws arises from conquest.

We must take care not to confound the system of personal laws with a privilege or exemption of one class of persons in any given state. This is *jus singulare*, an exception made by the legislature in favour of some particular class of citizens.*

There is also a semblance of conflict of laws where several systems of jurisprudence, blended together, prevail in the same territory. Of this Savigny furnishes the following important instance:—"A contradiction may exist between the different sources which together form the common law, or between that common law consisting of them taken together, and other sources of law added subsequently. The parts of the common law of Germany are, the Laws of Justinian, the Canon Law, the Imperial Laws, and the Customary Law scientifically established, that is to say, the decisions of the courts. If there be in the common law a contradiction which cannot be reconciled, the later is preferred to the older source. For, as such a contradiction belongs to the progressive development of the law, every new rule necessarily implies the abrogation of an older one. Therefore, to apply the law actually in force, we must follow the living and not the dead rules; and this shows a restriction of the principle laid down above. Thus, when the old rule was accompanied by an exception, that exception is not abolished by the new rule, but continues to subsist beside it, unless specially abrogated.†

"The general principle is applied thus. The decided cases, being the latest modification of the ancient sources, stand in the first place; next come the Imperial Laws, then the Canon Law, and then the Roman Law. The place assigned to the two latter sources requires some explanation."

"The question whether, in matters of private law, the Canon is to be preferred to the Roman Law, has been long disputed. Evidently the first thing is to try to reconcile them together when they apparently differ. But where such reconciliation is not possible, as, for instance, where the Canon Law openly changes the Roman Civil Law, several authors maintain this doctrine: the two laws, they say, have no authority among us, except by virtue of their reception in Germany; and as their reception took place at the same period, they are equal, and every case of conflict between them must be settled by the intervention of a special jurisprudence."

"But as to matters of private law, the Canon Law bears the same

* Savigny, *Traité du Droit Rom.* tom. 1, p. 60.

† L. 80, ff. De Reg. Jur.; l. 41, ff. De Penis.

relation to the Roman that the novels of Justinian do to the Pandects and Code, especially the decretals, which more frequently cause the conflict in question. On this footing the two laws were taken at Bologna, and when the decretals appeared, first separately, and then collected together as we now have them, the reception of both laws was an accomplished fact, and the decretals were, in reality, subsequent derogatory laws. In reality the Canon Law was complete when Germany adopted it, conjointly with the Roman Law. But that adoption took place in the same spirit as at Bologna—as also we admit no other sources of Roman Law than those which were recognized by the school of Bologna. This complete assimilation might only raise a doubt whether the Canon Law, received as law in Italy, was also so received in Germany. But at the time of its reception the Holy See and its laws were not less respected in Germany than in Italy, and therefore to accept the Canon Law and its supremacy was not for Germany to submit to the authority of Bologna, but to act on the same principles.”

“The result of all this is, with regard to private law, that the Canon Law has the preference, or superiority, in cases of conflict, over the Roman Law. This rule is, however, subject to an exception where there exists a special jurisprudence on the particular point, or, in Protestant countries, if a provision of the private Canon Law is in contradiction to the doctrines of the Protestant Church. The superiority of the Imperial (German) Laws over the Canon Law may produce the same effect, by an exception of the same sort, if those laws repeal a particular rule of the Canon Law, and re-establish a rule of the Roman Law.”⁴

The remarkable feature of German jurisprudence described above, serves to illustrate the apparent conflict which arises between the laws and customs of different provinces in the same country. Cases of that nature are decided on principles frequently similar or analogous to those which govern cases of conflict between the laws of independent states;⁵ but they belong exclusively to Municipal Law, and should be prevented or settled by legislation grounded on the common interest of the whole country, rather than on principles of comity. They appertain in some instances to internal Public Law, but generally to private law.

The federal constitution of the United States of America presents, however, a peculiar jurisprudence on this subject. For that constitu-

⁴ Savigny, *Traité du Droit Rom.* tom. 1, ch. 4, p. 258—260.

⁵ *Doe d. Birtwhistle v. Vardell*, 5 Barn. & Cress.; *Lolly's case*, 1 Russ. & Ry. Cr. Cas.

tion is an instrument containing the grant of specific powers, and the government of the Union cannot claim any powers but what are contained in the grant, and given either expressly or by necessary implication. The powers vested in the state governments by their respective constitutions, or remaining with the people of the several states, prior to the establishment of the constitution of the United States, continue unaltered and unimpaired, except so far as they are granted to the United States.* They are called the residuary sovereignty of the States.[†] Therefore the States forming the federation partake of the nature of sovereign states, so far as their residuary sovereignty extends. This shows why the American courts and writers have treated questions of conflict between the laws of the States according to principles of the Law of Nations, constantly resorting to the comity of nations. But even in this remarkable instance cases of conflict belong altogether to Municipal Law. Thus, for instance, the federal courts have jurisdiction in all suits between resident citizens of different States,[‡] and the decrees of those courts are binding on both parties, and take effect not by comity, but by the municipal law of the Union.

These instances suffice to show the nature of what may be called municipal conflict of laws. It has been adverted to, as necessarily connected with that subject to which we must now return, namely, the way in which the laws of different countries operate in cases of conflict, as part of the general scheme of laws by which civil society is governed in the whole world.

Huberus has laid down the three following general rules, adopted by Story, which contain the rudiments of this important branch of Public Law. I. The laws of every state have force only within the limits of its own government or jurisdiction, and bind all who are subjects thereof; but not beyond those limits. II. All persons who are found within the territories of a government, whether their residence be permanent or temporary, are to be deemed subject to that government. III. The rulers of states, by comity, give to the laws of every people, in force within the territories of such people, effect everywhere, so far as such laws do not prejudice the powers or rights of other governments or their citizens.[§]

* Kent, Com. vol. 1, lect. 15, p. 312.

† *Ibi*, lect. 10, pp. 209, 251, 332, 386.

‡ *Ibi*, p. 343, 344.

§ 1. *Leges cujusque imperii vim habent intra terminos ejusdem reipublice, omnesque ei subjectos obligant, nec ultra.* 2. *Pro subjectis imperio habendi sunt omnes qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur.*

The two first of these rules are grounded on the exclusiveness of every sovereign power within its own territory, a doctrine which has been already fully explained. The third defines very well the spirit and reason of comity. Huberus explains that rule by saying that the matter is to be determined, not simply by the municipal laws, but by the convenience and consent of different nations; for, since the laws of one people cannot have any direct force among another people, so nothing could be more inconvenient, in the commerce and general intercourse of nations, than that what is valid by the laws of one place should become of no effect by the diversity of laws of another.⁷ The reason of the comity of nations is here well stated, but, on the other hand, notwithstanding that comity, many things are valid in one place and void in another;⁸ and therefore the third rule of Huberus does not suffice to solve the difficulties of the conflict of laws. We must consequently proceed further, and consider the different sorts of laws with reference to conflict and comity.

The civilians have divided municipal laws into two classes, which they call respectively *real statutes* and *personal statutes*. On this distinction depends the question whether the law of the domicile or *lex fori*, or *lex rei sitæ* is to have the preference in cases of conflict.⁹ The distinction is subject to some doubt and difficulty in particular cases, but the following general rule, adopted by Chancellor Kent from Merlin, is sufficiently clear for our purpose. The laws which regulate the condition, capacity and incapacity of persons are personal statutes; and those which regulate the quality, transmission and disposition of property are real statutes. The test, he says, by which they may be distinguished consists in the circumstance, that if the principal direct and immediate object of the law be to regulate the condition of the person, the statute is personal, whatever may be the remote consequences of that condition or property. But if the principal direct and immediate object of the law be to regulate the quality, nature and disposition of property, the statute is real, whatever may be its ulterior effects in respect to the person.¹⁰ Voet adds a third class, that of mixed statutes;¹¹ but this seems doubtful and unnecessary.

3. Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercitia teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium prejudicetur. Hub. 2, tit. 3, De Conflictu Leg.; Story, Conflict of Laws, p. 35, § 29; Boullenois, Traité des Statuts, ch. 3, observ. 10, p. 155.

⁷ Story, *ibi*.

⁸ See, for instance, *Lolly's case*, 1 Russ. & Ry.

⁹ Kent, Comment. vol. 2, sect. 39, pp. 455, 456.

¹⁰ Kent, Comment. *ibi*, pp. 456, 457; Merlin, Répertoire, tit. Autorisation Maritale, sect. 10.

¹¹ Voet ad Pand. lib. 1, tit. De Statutis, § 4.

It is a general rule, that real statutes do not extend by comity to property beyond the territory of the state to which they belong.^d The meaning of this is, that property situated in one state is not governed by the laws of another state. Thus, in the case of *Nelson v. Bridport*, it was held that the property in dispute, being situated in Sicily, could not be governed by the law of England, and the Court was therefore compelled to decide according to the *lex loci rei sitæ*,* and not according to the English real law of entails and settlements. This case is the more remarkable because, at first sight, it seems as though a real law of Sicily had been extended to England. But this is not so, because the Court only gave effect to the Sicilian law in Sicily, where the property was. The general rule under consideration applies to the fullest extent to immovable or real property, which is exclusively governed by the *lex loci*, or territorial law of the situs.^f The principles on which is founded the rule that where the law regards things, the law of the *situs* is to govern, naturally leads to the conclusion that the validity of the execution of a contract is to be decided by the law of the place where it is executed, and not by any foreign law. And all acts done in court or out of court, whether testamentary or *inter vivos*, regularly executed in any place according to the law of that place, are in general held validly executed or done everywhere, even in countries where a different law prevails, and where, if transacted in the like manner, they would have been invalid.^g And the same principle applies, *vice versâ*, to the invalidity of contracts and other acts. If void or illegal by the law of the place of the contract, they are generally void and illegal everywhere.^h And so, if a contract be made in one country and to be performed in another, and the parties had in view the laws of such other country, in reference to the performance of the contract, the general rule is that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be performed or fulfilled.ⁱ This is stated by Kent as an exception to the general rule, *locus regit actum*, or *lex loci contractus regit actum*. But it is an exception only to the letter and not to the spirit of that rule. For in the case supposed, the law of the place where the contract was made would be a foreign law with regard to the place where the contract is to be fulfilled or enforced. And by the rule *locus regit actum*, the performance of the contract must be regulated by the law of the place of such performance.

^d Boullenois, vol. 1, p. 7, Principe vingt-septième.

^e *Earl Nelson v. Lord Bridport*, 10 Beav. 305.

^f Kent, Comment. vol. 2, pp. 428, 429; Story, Conflict of Laws, § 363, &c.

^g Story, Comm. § 239, 242; Sanchez, De Matrim. Disp. 18, n. 28.

^h *Ibid*, § 243.

ⁱ Kent, Comment. § 39, p. 459.

We must now notice a very important exception to the general rule already laid down as to real statutes. It is this. The right and disposition of and succession to movables, or personal property, are generally governed by the law of the domicile of the owner, or his actual domicile at the time of his death, and not by the law of their local situation.⁴ By some writers, as Story shows, this principle is derived from a legal fiction, that movables are situated in the place of the owner's domicile; while others hold, that laws regarding movables are personal and subject to the rule which governs personal statutes.¹ The learned American jurist, however, very judiciously concludes, that the doctrine in question had its true origin in an enlarged policy growing out of the transitory nature of movables and the general convenience of nations. If, he continues, the law *rei sitæ* were generally to prevail in regard to movables, it would be utterly impossible for the owner, in many cases, to know in what manner to dispose of them during his life or to distribute them at his death; not only from the uncertainty of their situation in the transit to and from different places, but from the impracticability of knowing, with sufficient accuracy, the law of transfers *inter vivos*, or of testamentary dispositions and successions in the different countries in which they might happen to be. Any change of place at a subsequent time might defeat the best considered will; and any sale or donation might be rendered inoperative from the ignorance of the parties of the law of the actual *situs* at the time of their acts. There would be serious evils pervading the whole community, and equally affecting the subjects and interests of all civilised nations. But in maritime nations depending upon commerce the mischief would be greatest. A sense of general utility must therefore have first suggested this doctrine, and it could not fail to recommend itself to mankind by its convenience and enlarged policy.²

These fundamental doctrines will facilitate the comprehension of the jurisprudence regarding personal statutes, a subject which has a more direct bearing on Public Law than that which we have been considering. We have seen that personal statutes are those which regulate the condition, capacity and incapacity of persons. The general rule regarding this class of laws is the reverse to that which applies to real statutes, for the status of persons and its incidents are in general de-

⁴ Story, *Conflict of Laws*, § 376, p. 549; Kent, *Comment.* vol. 2, § 37, p. 428; Vattel, *Droit des Gens*, l. 2, ch. 7, § 85; ch. 8, § 100, 103; Story, § 481.

¹ *Ibid.*, § 377, 378.

² *Ibid.*, § 379; *In re Elwin*, 1 *Crompt. & Jerv.* 156; *Sill v. Worswick*, 1 H. Bl. 690; *Doe d. Birtchistle v. Vardill*, 5 *Barn. & Cress.* 438, 451, 452; 9 *Bligh*, 32—38; 2 *Clarke & Fin.* 571.

terminated by the law of his domicil, that is to say, a man is deemed everywhere in the same legal state, universal or particular, in which he is placed by the law of his domicil.^a Thus, if a person be married, or a minor by the law of his domicil, he is held to be the same everywhere else. And therefore the law of nations holds that the appointment of a guardian to a minor by the law of his domicil shall be valid and effectual everywhere,^b though this arises also from the rule *locus regit actum*. But the general principle regarding status must not be extended to interfere with the exclusive jurisdiction of real statutes regarding immovables. Thus, if by law of the place where immovable property is situated, the age of majority be five and twenty, the owner cannot enjoy the rights of majority with reference to that property before he has reached that age, though by the law of his domicil he be of full age at twenty-one. Boullenois indeed holds a different opinion, but the sounder doctrine seems to be in favour of this exception;^c for the rule applicable to immovable property is grounded on paramount principles of Public Law regarding the nature of territorial sovereignty.

In cases of conflict depending on the question of domicil, there is frequently much difficulty in determining the domicil of the party. This is generally a question not of law but of fact, for that is the domicil of a person where he has his true fixed home and principal establishment, and to which, when absent, he has the intention of returning;^d and two things must concur to constitute domicil: first, residence; and, secondly, the intention of making it the home of the party.^e Ulpian, Labeo, Celsus and Julian, differ on the question of a double domicil;^f and the more received opinion is that of Ulpian and Paulus, that a man may have two domicils at the same time.^g Ulpian, however, thinks this a rare case difficult to be proved, and the acquisition of a new generally extinguishes the old domicil.

With regard to changes of domicil, the more received and better opinion seems to be that the actual and not the original or former domicil is to prevail.^h The best reason for this general rule is, that

^a Story, Conflict of Laws, § 51, p. 56.

^b Vattel, Droit des Gens, l. 2, ch. 7, § 85.

^c Story, Conflict of Laws, § 52.

^d Story, Conflict of Laws, § 41, ch. 3, p. 44; l. 7, Cod. De Incolis; l. 27, § 1, ad Municip.; l. 203, ff. De Verb. Signif.; ibi, l. 239, § 2; Voet ad Pand. l. 5, tit. 1, De Judiciis ubi quisque, § 42, 94; Pothier's Pandects of Justin. l. 50, tit. 1, § 2; Vattel, Droit des Gens, l. 1, ch. 19, § 218.

^e Story, § 44; l. 20, ff. ad Municipalem et de Incolis.

^f L. 5, ff. ad Municipalem et de Incolis; l. 27, ibi, § 1—3.

^g Voet ad Pand. lib. 5, tit. 1, § 92.

^h See the authorities in Story, § 55, &c. § 69.

there would be manifest inconvenience in holding that the status of a person is regulated by the law of a place where he is no longer domiciled, and not by that of the place where he has his actual domicile; and as domicile is essentially mutable, its legal effects on persons ought not to be indelible, at least so far as they arise from domicile alone. This limitation is necessary; for (as Story says, with the authority of Boullenois) there are states and conditions of persons which are legal rights grounded on public reasons admitted by all nations, and not arising from domicile, and which therefore are not affected by change of domicile.^a Boullenois gives as examples of these states, interdiction for lunacy or prodigality, emancipation by letters of the sovereign, legitimacy, nobility and legal infamy. But this proposition must be understood as only asserting that in a country where a particular state or condition of this sort, according to the law of a foreign domicile, is, by comity, admitted, a change of domicile will not alter that state or condition, but leave it to be determined by the law of the former domicile where it has been impressed on the person. We must remember the doctrine of the third rule of Huberus, which makes the admission of foreign laws by comity dependent on the interest or welfare of each country; for, with reference to the status of persons, this is especially important. There are, as Story remarks, no universal rules by which nations are or ought to be morally or politically bound on this subject.⁷ The status of persons is a matter intimately connected with political and social considerations, of which each sovereign power must be the only proper judge within its own territories; and every State has a right to prescribe the conditions subject to which it will allow the entry and residence of strangers within its territories, provided those conditions be not inconsistent with the rights of humanity: and strangers are bound by the laws of the country where they are.⁸ Thus, by the law of England, a foreign nobleman, even of the highest rank, is, when in England, only an esquire.⁹ And so a person legitimate elsewhere may be held illegitimate in England; for the rule, that personal *status* accompanies a man everywhere, has this qualification — that it must not militate against the law of the country where the consequences of that *status* are sought to be enforced.^b

^a Story, § 71, 72; Boullenois, vol. 2, observ. 32, pp. 10, 11, 13, 19.

⁷ Story, Conflict of Laws, § 73.

⁸ Vattel, Droit des Gens, liv. 2, ch. 8, § 100; St. A. Liguori, Theolog. Mor. lib. 1, cap. 1, dubium 2.

⁹ Co. Litt. 16 b; Calvin's case, 7 Rep. 30, 31.

^b Birtwhistle v. Vardill, 5 Barn. & Cress. 455.

These considerations are particularly important with reference to the conflict of laws regarding marriage, a subject the fundamental principles of which must now be examined. That contract is essentially of natural law and *juris gentium*^c—the parent, not the child of society—*principium urbis et quasi seminarium reipublicæ*.^d It belongs not only to civil society as such, but to natural society, which is universal and anterior to municipal laws. Marriage is a sacrament of the Roman Catholic Church; and in Catholic, and in some Protestant countries, it is treated as such by the temporal laws.^e And the sacrament of marriage is not a sacrament added to a contract, but a natural contract raised to the dignity of a sacrament,^f though the Church distinguishes the natural and civil contract of marriage from the sacrament^g where the latter does not exist.^h These universal features of the marriage contract, as well as the circumstance that from it springs the important status of legitimacy and the relations of consanguinity and affinity, point it out as peculiarly the subject of the comity of nations.

The general principle on this subject is, that with regard to the constitution of marriage, as it is a personal contract, it must be valid everywhere if celebrated according to the law of the place of celebration: but the rights and obligations arising therefrom are in general governed by the law of the domicile.ⁱ The *sacrament* of marriage, if valid in the place where it is celebrated, is valid everywhere by the public law of the Church. Thus in places where the decrees of the Council of Trent have not been published, the sacrament of marriage may be validly celebrated without the presence of a priest, provided the parties did not go there for the purpose of evading the decree of the council.^j

The fundamental rule that the validity of a marriage depends on the law of the place where it is celebrated, so that if valid there it is valid everywhere, and vice versa,^k must be received with this limitation—that it applies to persons *sui juris*, and capable of contracting marriage. For we have seen that the law of a particular country may

^c L. 1, ff. § 3, De Just. et Jur.; l. 1, ff. De Ritu Nuptiarum; l. 4, Cod. De Crimin. Expilator. Hereditatis.

^d Story, Conflict of Laws, ch. 5, § 108.

^e *Dalrymple v. Dalrymple*, 2 Hagg. Consist. Rep. 63—65; *Lindo v. Beluário*, 1 Hagg. Consist. Rep. 231.

^f Devoti, Inst. Canon. lib. 2, tit. 2, sect. 7, § 103, tom. 1, p. 502.

^g Catechismus Romanus, pars 2, cap. 8, § 9.

^h Devoti, ubi sup. § 106, p. 503.

ⁱ Story, § 110.

^j Schmalzgrueber, tom. 4, pars 1, pp. 298, 299; Devoti, Inst. Canon. tom. 1, pp. 550, 551, lib. 2, tit. 2, sect. 9, § 147.

^k Story, § 113.

make invalid a marriage contracted by its subjects under specified circumstances, wherever it be contracted ;^m and a marriage contracted by parties in a foreign country where they are not domiciled, but to which they have resorted with a view to evade, not regulations, but prohibitions of the law of their own country, would not be valid in the latter country, though in accordance with the *lex loci contractus*.ⁿ The reason is, that such prohibitions are grounded on public and social policy, which belong to the public law of each country, and are within the principle of exclusive sovereignty. A person domiciled here cannot be permitted to import into this country a law opposed to the social system sanctioned by the public law of this country.^o Thus the law of England holding marriage indissoluble except by the transcendant power of Parliament, does not allow an English marriage to be dissolved by a foreign divorce ; and therefore a second marriage celebrated where that divorce is valid and effectual, would be void in England, though legal by the *lex loci contractus* ; and the issue of such second marriage would be illegitimate in England, though legitimate in the place of the marriage.^p

Another exception to the general rule that a marriage ought to be celebrated according to the *lex loci contractus* must now be noticed. It is grounded on a sort of moral necessity existing with regard to persons residing in foreign factories, in conquered places, in desert or barbarous places, or in countries of an opposite religion, who are allowed therefore, from necessity, to contract marriage there not according to the *lex loci* (if there be any), but according to the law of their own country.^q On this principle Lord Stowell held valid a marriage celebrated between English subjects at the Cape of Good Hope by the chaplain of the British forces, occupying that settlement under a capitulation.^r He said, in giving judgment :—"What is the law of marriage in all foreign establishments settled in countries professing a religion essentially different ? In the English factories at Lisbon, Leghorn, Oporto, Cadiz, and in the factories in the east, Smyrna, Aleppo and others, in all of which (some of these establishments existing by authority under treaties, and others under indulgence and toleration), marriages are regulated by the law of the original country to which they are still considered to belong. An English resident at St. Petersburg does not look to the ritual of the

^m *Sussex Peerage case*, 11 Clarke & Fin. 85.

ⁿ Barge, Comment. vol. 1, pp. 190, 191 ; Huberus, Conf. Leg. lib. 1, tit. 3, n. 8.

^o Story, § 112 ; Lord Fergusson on Marriage and Divorce, 397—399.

^p Story, § 117.

^q *Ibid*, § 118.

^r *Ruding v. Smith*, 2 Phil. Eccl. R. 332.

Greek Church, but to the rubric of the Church of England, when he contracts a marriage with an English woman. Nobody can suppose that whilst the Mogul empire existed, an Englishman was bound to consult the Koran for the celebration of his marriage. Even where no foreign connexions can be ascribed, a respect is shown to the opinions and practice of a distinct people. The validity of a Greek marriage in the extensive dominions of Turkey is left to depend, I presume, on their own canons, without any reference to Mahometan ceremonies. There is a *jus gentium* upon this matter—a comity which treats with tenderness, or at least with toleration, the opinions and usages of a distinct people in this transaction of marriage. It may be difficult to say *a priori* how far the general law should circumscribe its own authority in this matter. But practice has established the principle in several instances; and when the practice is admitted, it is entitled to acceptance and respect. It has sanctioned the marriages of foreign subjects in the houses of the ambassadors of the foreign countries to which they belong. I am not aware of any judicial regulation on this point; but the reputation which the validity of such marriages has acquired makes such a recognition by no means improbable if such a question were brought to judgment." In the same case Lord Stowell said:—"It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else. But they have not *e converso* established that marriages of British subjects not good according to the law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is, therefore, certainly to be advised that the safest course is always to be married according to the law of the country, for then no question can be stirred. But if this cannot be done on account of legal or religious difficulties, the law of this country does not say that its subjects shall not marry abroad."* This decision is founded on the principle that marriage is a highly-favoured contract, both natural and civil, and *juris gentium*, and therefore the comity of nations will in cases of conflict of laws sustain it wherever they can do so without violation of their own internal policy. As no country can oblige others to adopt its marriage law, each country gives effect to the *lex loci* of marriage so far as regards the validity of the contract, leaving its subjects at liberty, under circumstances of moral necessity, to enter into that contract according to their own law in a foreign country.

The principles already stated that no one is allowed to import into

* *Ruding v. Smith*, 2 Phil. Eccl. R. 286.

any country a law contrary to its public and social policy, shows why the incidents or legal consequences of marriage are not regulated by *lex loci contractus*, but in general by that of the domicile. Those consequences are infinitely various in different countries, with regard both to the personal rights and obligations of the conjugal relation, and those which apply to property. And as marriage is not a mere private contract, but a civil and religious institution of a very important nature, the operation of the *comitas gentium* must be modified or restricted by the internal policy of each country. Thus, though a marriage celebrated according to *lex loci contractus* is valid everywhere, it is not so with the dissolution of marriage by divorce. For by the canon law, marriage is indissoluble,¹ and so it is by the law of Roman Catholic countries,² and by the common law of England; but the protestant states of Europe, such as Holland, Prussia and Scotland, do not admit marriage to be either a sacrament or indissoluble.³ Each country holds its own laws on this subject to be essential for the good order and morality of society. Therefore, though the law of Scotland will grant a divorce from an English marriage, even where the parties are not domiciled in Scotland, the law of England will not admit a foreign divorce to dissolve an English marriage in England.⁴ The rule is, that a divorce, regularly obtained according to the law of the country where the marriage is celebrated and where the parties are domiciled, will be held a valid dissolution of the marriage contract in every other country.⁵ But no country where the Roman Catholic Religion is the religion of the state, could admit the validity of a divorce of its Roman Catholic subjects under any circumstances; because the indissolubility of the vinculum of marriage is an essential part of the Public Law of those countries, and expressly laid down by the Council of Trent.⁶ The general principle of the comity of nations regarding divorce a vinculo is, that it is inconvenient and injurious to the interests of society that persons should be held married in one country and unmarried in another; but, on the other hand, each country has a right to maintain the observance of those rules which it deems material to religion, morality and the welfare of the community. These two conflicting propositions lead to different results in different countries. We have

¹ Decret. Gratian. Caus. 32, quest. 7, c. 7; Concil. Trident. sess. 24, De Sacram. Matrim. can. 7.

² Burge, Comment. vol. 1, p. 643; Story, Conf. § 209.

³ Burge, Comment. vol. 1, p. 648.

⁴ Story, § 217, 218, 221, 222; *Warrender v. Warrender*, 9 Bligh; S. C. 2 Clarke & Fin. 488; Kent, Comment. vol. 2, lect. 27, p. 110, &c.

⁵ Kent, Comment. vol. 2, lect. 27, pp. 107, 108; Story, § 201.

⁶ Concil. Trident. sess. 34, can. 7.

seen the principles of the English and Scotch law and that of Roman Catholic countries. The American courts seem more liberal in extending the comity by which they have decided questions between the laws of the states composing their union. For in America, the law of the place of the actual *bonâ fide* domicile of the parties gives jurisdiction to the competent courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the original marriage, or the place where the offence for which the divorce is allowed was committed.^b

The incidents of a foreign divorce are to be deduced from the law of the place where it is decreed. Its effects on personal property depend on that law, and in respect to immovable property the effects would be regulated by the law of the place where it is situated, the *lex loci rei sitæ*.^c

With regard to the effects of marriage on property, the general principle obtains that in the absence of express contract, the law of the matrimonial domicile governs movables. This arises from the principles already laid down respecting movables. And immovable property is governed, as to the effects of marriage, by the law *rei sitæ*.^d If there be an express contract regarding movables, valid by the law of the place where it is entered into, it will be valid everywhere, except in countries in which it is forbidden.^e

We come now to the Conflict of Laws regarding the jurisdiction of courts and judicial remedies.

The doctrines already laid down regarding the rights of a sovereign power within its territory, point out the rules of Public Law respecting the competency of courts to hold jurisdiction over persons and things. The general rule is given by Paulus—*extra territorium jus dicenti impune non paretur*;^f and the converse is implied, that the judge must be obeyed within his territory. And the sovereign power has the administration of justice within its territory, in all temporal causes, exclusive of every foreign jurisdiction.^g Therefore no sovereign has a right to interfere in causes of his subjects in foreign countries, and give them his protection, excepting in case of denial of justice, or evident and palpable injustice, or manifest violation of rules and forms, or an

^b Story, § 230 a.

^c Story, § 230; *Warrender v. Warrender*, 9 Bligh, 127; *Curtis v. Hutton*, 14 Ves. jun. 537, 541.

^d Story, § 186.

^e Story, § 184.

^f L. 20, ff. De Jurisdic.

^g Vattel, *Droit des Gens*, l. 11, ch. 7, § 81; Huberus, tit. 3, De Conflictu Leg. reg. 1, 2; Story, *Conflict of Laws*, § 29.

odious distinction made to the prejudice of his subjects or of all strangers.^b It follows, that jurisdiction, to be rightfully exercised, must be founded on the fact of the person being within the territory, or the thing being within the territory. And every exercise of jurisdiction by any court beyond its own territory is a mere nullity, and 'incapable of binding persons or property so as to be effectual in any other tribunal.'¹ Another general rule is, that (*actor sequitur forum rei*) the plaintiff must sue in a court having jurisdiction over the defendant, or having jurisdiction over the thing which is the subject of the suit.^k And the forms of remedies, and the order of judicial proceedings, are to be according to the law of the place where the action is instituted, without regard to the domicile of the parties, the origin of the right, or the place of the act.^l

Grotius observes, that the authority of the judge over foreigners is not of the same force as that which he exercises over the subjects of the state. But the great jurist explains his meaning, that, however unjust a sentence may be, a native must submit,^m whereas a foreigner can, in case of gross and palpable injustice, appeal to the protection of his own sovereign.ⁿ A state may, without violation of international law, exclude all foreigners from its territories,^o though there may be particular cases in which to exclude them would be cruel, and contrary to the common duties of humanity.^p Every state may therefore prescribe (giving due notice) the conditions on which it will admit them;^q and in all cases they are admitted under the implied condition that they will submit to the laws and jurisdiction of the country—a duty, indeed, which springs immediately from the very nature of dominion and territorial sovereignty.^r They are, therefore, bound to obey the laws, and amenable to the courts of the country from the moment that they enter it;^s and, on the other hand, they are entitled to the same

^b Vattel, *ibi*; Grotius, *Droit de la G.* l. 3, ch. 2, § 5; Covarruvias, *Op.* tom. 1, p. 492, in cap. *Peccatum* (De reg. jur. in Sexto), par. 2, § 9, n. 4.

¹ Story, *Conflict of Laws*, § 539.

^k Story, § 532; L. 3, Cod. Ubi in rem actio exerceri debeat; l. 2, Cod. De Jurisdic. omn. Judic.; l. 5, eod. Tit.

^l Story, § 558.

^m L. 11, ff. De Just. et Jur.; Vinnius ad Inst. lib. 4, tit. 13, § 5; l. 6, ff. De exceptione rei judicate.

ⁿ Grot. *Droit de la G.* l. 3, ch. 2, § 5.

^o Vattel, *Droit des Gens*, l. 2, ch. 7, § 94; ch. 8, § 100.

^p Pufend. *Droit des Gens*, l. 3, ch. 3, § 8.

^q Vattel, *Droit des Gens*, l. 2, ch. 8, § 100.

^r *Ibi*, § 100, 101.

^s *Ibi*, § 102, 103; Pufend. *Droit des Gens*, l. 3, ch. 3, § 10, n. 1; l. 3, ch. 6, § 2; l. 4, ch. 6, § 14.

protection as the subjects of the state.¹ Thus the law of England holds that a local temporary allegiance to the crown is due from an alien so long as he continues within the king's dominion and protection.² And by the law of England, a foreigner is entitled to the same justice as a natural-born subject.³ In France, however, with a few exceptions, the courts do not entertain jurisdiction of controversies between foreigners respecting personal rights and interests.⁴

The obedience of foreigners to the laws and jurisdiction of the place where they are is matter of secondary natural law, as appears from the reasons and authorities given by Suarez. He argues, in the first place, that municipal laws are made generally for a given territory, and must, therefore, be binding on all within their provisions in that territory, so long as they remain there. It is morally necessary for the good government of the territory that the laws made for it should have that authority; and so it is necessary that foreigners within the territory should, for the sake of the peace and good morals of the place, conform to its laws during the time that they remain there. And as every sovereign power has the authority necessary to preserve and protect the commonwealth, it must have a right to make laws binding on all within the territories under its government.⁵ Consequently, a foreigner cannot plead the laws of his own country as a reason for disobeying or exempting himself from those of the country where he is. But there are municipal laws which apply to subjects of the state exclusively, and from these foreigners are exempt. Thus a foreigner in France would not be liable to the military conscription. Sovereign princes are everywhere *extraterritorial*, or exempt from jurisdiction.⁶ And ambassadors and other diplomatic ministers or officers, and their retinue, are exempt from the jurisdiction of a country where they are accredited or employed.⁷

¹ Vattel, *Droit des Gens*, § 104.

² *Calvin's case*, 7 Rep. 6. So St. Alph. Liguori says, "*Advena vere fit subditus superioris loci, quamvis brevis ibi sit.*" And see the authorities cited there. Theolog. Mor. lib. 1, tractat. 2, cap. 2, dubium 2, § 156.

³ *Pisani v. Lawson*, 6 Bing. N. C. 30; 8 Scott, 180; *Duckworth v. Tucker*, 2 Taunt. 37, n.

⁴ Story, *Conflict of Laws*, § 542.

⁵ Suarez, *De Leg. lib. 3*, cap. 33, § 3, 4.

⁶ Martens, *Droit des Gens*, liv. 5, § 172; Whenton, *Hist. of the Law of Nations*, p. 237—239; Bynkershoek, *De Foro Legatorum*, cap. 3; *The Duke of Brunswick v. King of Hanover*, 6 Beav. 88. But a foreign sovereign may sue here both at law and in equity; and if he sue, he submits himself to the jurisdiction. See the cases cited by Lord Langdale in *The Duke of Brunswick v. The King of Hanover*, and L. 22, ff. *De judic. et ubi quis*; *The King of the Two Sicilies v. Willcox*, 1 Sim. N. S. 333.

⁷ Vattel, *Droit des Gens*, liv. 4, ch. 7, § 8, 9; Martens, liv. 7, ch. 5; Bynkershoek,

Having laid down these general doctrines regarding the jurisdiction of sovereign powers within their respective territories, we must next consider how far a judgment of a competent tribunal in one country has effect in another.

The general principle of Public Law is, that when a judgment is pronounced by a court having lawful jurisdiction over the cause, over the thing, and over the parties (or at least over the defendant), other nations ought to respect it.^a The reasons of this proposition are as follows. Civil society could not exist if every man were allowed to interpret and apply the law in his own case; and however skilfully laws may be framed, they cannot comprehend clearly every case. Therefore, disputes must arise touching their application to particular cases; and it is frequently necessary to examine into a multitude of circumstances where particular actions or omissions of individuals are complained of, and alleged to be at variance with the law.^d Consequently the judicial power or jurisdiction, in the stricter sense of the word, that is to say, the public power of deciding causes, civil and criminal,^e is an essential part of the supreme power of civil government.^f The judicial power is erected as a substitute for private war, the avoiding and preventing of which is one of the chief objects of civil society. And thus the right of individuals to enforce and administer justice to themselves is utterly taken away, excepting in those cases wherein, as Grotius says, the path of public justice is not open to them.^g It follows that this power or sovereign function is *juris gentium*, and of secondary Natural Law, and essentially a subject for the comity of nations, which, as we have seen, is grounded on the common welfare of mankind. It may indeed be said with reason, that human society could better exist without any enacted laws or definite customs than without judicial power under some form. And so it is difficult to conceive even natural human society as contradistinguished from the civil state, without judicial power to decide questions arising among men.^h

De Foro Legatorum, c. 17—19; Bla. Com. vol. 1, ch. 7, p. 253—256; Kent, Com. vol. 1, lect. 2, pp. 38, 39; Wheaton, Hist. of the Law of Nations, pp. 237, 240, 244. And see *Taylor v. Best*, now before the C. P., January, 1854.

^a Story, Conflict of Laws, § 585, 586.

^d L. 10, ff. De Legib.; Pufend. Droit des Gens, l. 7, c. 4, § 4.

^e Voet ad Pand. l. 2, tit. 1, De Jurisd. § 1.

^f Hugon. Donelli Comment. tom. 4, lib. 17, cap. 2; Pufend. ubi sup.; L. unic. Cod. Ne quis in sua causa; l. 13, ff. Quod metus causa; l. 176, ff. De Reg. Jur.; Fabri Comment. ad tit. Pand. De Reg. Jur. ad l. 137.

^g Lampredi, Jur. Publ. Univers. par. 3, cap. 11; Carmignani, Elem. Jur. Crim. vol. 1, p. 214; Grot. Droit de la G. l. 1, c. 3, § 3.

^h See my Commentaries on the Modern Civil Law, p. 278.

These reflections show that the principle of the comity of nations regarding foreign laws extends to foreign judgments or judicial decrees also. As for the degree of authority which that comity should give to a foreign judgment, valid by the law of nations, the question depends in a great degree on the nature of the law and the right on which that judgment rests. Thus, where the matter in controversy is the right and title to land or other immovable property, the judgment pronounced in the *forum rei sitæ* is held conclusive in other countries. This arises from the principles of international law already laid down regarding immovable property.¹ Those principles also lead to the conclusion, that if movable property be situated within the jurisdiction of a court of a given country, whatever that court decides regarding the right and title to that property, or whatever disposition it makes thereof, by sale or otherwise, is valid in any other country where the same question regarding the same property comes for adjudication between the same parties.² Judgments of this nature, deciding the title to property or *dominium*, independently of any obligation of a particular person or persons, are called judgments *in rem*.³ The reason of this general rule of international law is, that the court has the actual jurisdiction and power over the thing itself, the title to which was in dispute; and the conclusiveness of the judgment follows as a consequence, from the principle that each country has sovereign jurisdiction over the things that are situated within its territories. These principles are frequently applied in cases of proceedings *in rem* in foreign courts of admiralty, in causes over which such courts have a rightful jurisdiction, founded on the actual or constructive possession of the thing itself, which is the subject-matter of the cause.⁴

With respect to judgments in causes of marriage and divorce, the principles already explained regarding the conflict of laws in such cases will suffice. The first question is, whether the judgment was pronounced by a competent tribunal in regard to persons within the jurisdiction? If so, such judgment is, as a general rule, valid everywhere.⁵ But this rule is subject to exceptions, arising from the policy of each country on those very peculiar subjects, and from the place where the marriage was celebrated.⁶ Thus we have seen that the English courts

¹ Story, § 591.

² *Ibi*, § 592.

³ See my Commentaries on the Modern Civil Law, p. 283—285; Inst. lib. 4, tit. 6, § 1; lib. 3, tit. 19, § 2; Story, Conflict of Laws, § 530.

⁴ Story, § 592.

⁵ Story, § 595; *Roast v. Garvin*, 1 Ves. 157.

⁶ *Sinclair v. Sinclair*, 1 Hagg. Consist. Rep. 297; *Serimshire v. Serimshire*, 2 Hagg. Consist. Rep. 397, 410.

will not admit a foreign divorce *a vinculo* to dissolve an English marriage. And though a sentence of nullity of marriage, pronounced in the country where it was solemnized, would have great authority in England, such a sentence in a third country would not be universally binding.^p

We come now to judgments *in personam*, that is to say, in causes to enforce rights and obligations which do not arise from *dominium*, or proprietorship.^q In these causes the authority of the Court arises from jurisdiction over the person, either because he is actually within the territory of the Court, or because the Court has the power of compelling him to obey, or at least of giving effect to legal process or decrees for that purpose.

When a judgment of this nature, pronounced by a Court of competent jurisdiction, and having jurisdiction over the person and subject-matter in the cause, is pleaded in another country by way of *exceptio rei judicatæ*, it ought, as a general rule, to be held conclusive.^r This rule is grounded on the reason of the *exceptio rei judicatæ* itself, that some limit should be put to litigation, and conflicting decisions regarding the same subject-matter avoided.^s Therefore, it is for the common benefit of society that a cause of this sort finally decided in one country should be held a bar to the same suit being again commenced in another.^t The law of England, however, does not, it seems, act upon this doctrine to its full extent.^u

Somewhat different principles apply to cases where a judgment *in personam* is sought to be enforced in the Courts of another country than that where such judgment was pronounced. The general doctrine is, that no sovereign is bound, *jure gentium*, to enforce any foreign judgment within his dominions; and therefore, if such a judgment be sought to be enforced there, he is entitled to examine into the merits.^v In England a foreign judgment has been held by Lord Mansfield and other judges to be *primâ facie* evidence to sustain a judgment, and presumed to be right until the contrary is established;^w but Mr. Story says, that the present inclination of the English Courts is

^p Lord Stowell, *ibi*.

^q See my Commentaries on the Modern Civil Law, p. 283—285.

^r Kent, Comment. vol. 2, lect. 27, p. 120.

^s L. 6, ff. De except. rei judic.

^t *Phillips v. Hunter*, 2 H. Bl. 410; Erskine, Instit. b. 4, tit. 3, § 4; Vattel, Droit des Gens, l. 2, ch. 7, § 84, 85.

^u Story, § 599.

^v Story, § 598.

^w Story, § 603, and the cases there cited.

to sustain the conclusiveness of foreign judgments, although there is considerable diversity of opinion among the judges.*

The principles of Public Law sustain the opinion of those who hold that a foreign judgment ought not, as a general rule, to be examined, even when it is sought to be enforced by proceedings in Courts of a different country. It is highly convenient that each country should give credit and effect to the judicial acts of other countries, for the purpose of facilitating the administration of justice, on which the common peace, good order, and welfare of human society in general, very much depend. And this rule is calculated to obviate differences and misunderstandings between nations. In truth the administration of justice is a matter not merely municipal, but of universal concern, and even necessity, since without it even mere natural society could scarcely exist; and an enlarged view of civil society shows, as we have seen, that the division of mankind into nations and states is a subordinate institution, arising from political, administrative, and physical causes, and therefore it does not supersede any of the principles of universal civil society. Consequently, the jurisdiction of all countries ought, as far as possible, to operate harmoniously for one end—the administration of justice in that universal society, which requires that the Courts of different countries should not defeat and discountenance, but rather assist each other.

These important doctrines must, however, be understood with the qualification already adverted to, that each country is the judge of what its internal interests require, and therefore entitled to reject the decisions of foreign Courts when contrary to its own policy, and the welfare of its own citizens.

* Story, § 604—606.

CHAPTER XVII.

OF THE CONFLICT OF LAWS REGARDING CRIMES AND OFFENCES.—EX-
TRADITION.—REFUGEES.—GENERAL REFLECTIONS ON THE CONFLICT
OF LAWS.

By primary natural law alone, without regard to the institution of civil society, there is, as Grotius says, a right of punishing violations of the law, though that law does not determine in what person the right is vested.^a This, indeed, is a consequence of the right of self-defence so broadly laid down by Florentinus in the Pandects.^b For the same natural law which gives the precepts *honeste vivere, alterum non lædere, suum cuique tribuere*,^c authorizes every man to defend his own rights against those who violate them; and on the same principle he is justified in taking the necessary measures to prevent or discourage future injuries to himself or others by punishing the wrong-doer. And from this right of persons having no common superior to protect themselves, not only by defence against attacks, but by punishing wrong-doers, the right of war is in part derived.^d In the civil state, and under municipal laws, the right of punishment assumes a different form. A penalty or punishment under Municipal Law is neatly defined by Voet to be—*Delicti coercitio, adeoque malum passionis propter malum actionis*. It is more fully defined by Boehmerus to be an evil suffered, which is inflicted by the authority of a superior, on account of an offence, and for the common benefit of the citizens.^e And Grotius holds the same doctrine.^f Punishment is inflicted by the authority of a superior, because, under Municipal Law, the right of punishing offences passes from individuals to the State.^g Thus Paulus says—*Non est singulis concedendum quod per magistratum publice fieri potest*.^h

^a Grot. Droit de la G. liv. 2, c. 20, § 31; Pufend. Droit des Gens, liv. 8, ch. 3, § 4, note 3, Barbeyrac.

^b L. 3, ff. De Just. et Jur. And see l. 45, § 4, ff. Ad Leg. Aquil.; l. 8, § 2, ff. Quod Metus Causa.

^c L. 10, § 1, De Just. et Jur.

^d Grotius, Droit de la G. l. 2, ch. 20, § 1, 2, 3, 37.

^e Voet ad Pand. tit. De Pœnis, § 1; Boehmer. Elem. Jur. Crim. § 2, c. 1. And see Mathæus de Crimin. tit. 8, § 1, p. 754.

^f Grot. ubi sup. § 1, 4, 9.

^g Pufend. Droit des Gens, liv. 8, ch. 3, § 4, note 3 (Barbeyrac); liv. 8, ch. 6, § 8.

^h L. 156, ff. de Reg. Jur.; l. 13, ff. Quod Metus Causa; Gravina, Histor. de Ort. et Progress. Jur. Civ. ch. 91.

We may conclude from these principles and authorities, that punishments are of natural law and *juris gentium*, though the form in which the right of punishing offences exists in civil society, is given by municipal law. This position will afford us a key to the jurisprudence of the conflict of laws regarding crimes and offences. That conflict arises in two ways, that is to say, 1st. When an offence is committed in one country against the laws of another; and 2ndly. When a person has committed an offence and been convicted and sentenced in one country, and has withdrawn himself to or is situated in another. I do not mention the case of a foreigner violating the laws of the country where he is, because, as we have seen, a foreigner becomes subject to the laws of the country as the citizens of that country are, and therefore no conflict arises.¹

We have seen that the prohibitory laws of a country may follow its subjects wherever they go, so that acts done by them in foreign parts are affected by those laws.² And this principle extends as well to criminal as to civil laws.³ Thus, by the law of England, treasons committed by subjects of the British crown, out of the realm, may be tried in the Queen's Bench, in any county where the court sits, or under a special commission of oyer and terminer, in any county within the realm, as the crown shall direct.⁴ This is not contrary to international law, because though a foreigner becomes subject to the laws and jurisdiction of the country where he is, so long as he remains there, yet this position must be understood as not affecting the maxim *nemo potest exere patriam*. Therefore, by the law of England, if the crown send a writ to any subject when abroad, commanding his return, and the subject disobey, it is a high contempt of the royal prerogative, for which the offender's lands shall be seized till he return, and then he is liable to fine and imprisonment.⁵ There are, indeed, laws of his own country which a man is not bound by while he remains abroad; and this is one reason why foreigners are generally⁶ subject to the laws of the country where they are sojourning.⁷ But though the jurisdiction of every sovereign state is exclusive, within its own territories, of every other temporal jurisdiction, yet that principle does not require any state to allow its subjects to violate its laws by

¹ And see Merlin, *Repertoire*, art. *Souveraineté*, § 4, vol. 16, p. 397.

² *Suarez Peerage case*, 11 Clarke & Fin.

³ Suarez, *De Legib. lib. 3, cap. 32*.

⁴ Stat. 26 Hen. VIII. c. 13; 35 Hen. VIII. c. 2; 5 & 6 Edw. VI. c. 11.

⁵ Bla. Com. b. 1, c. 7, p. 265, 266; Hawkins, *Pleas of the Crown*, 22.

⁶ Vattel, *Droit des Gens*, liv. 2, ch. 8, § 107—109.

⁷ St. Alphons. Lig. Theolog. Moral. lib. 1, tract. 2, cap. 2, duh. 2, § 156, and the authorities cited there.

going abroad, and there committing the offence, though it be no offence by the laws of the country where the act was done. Every state may, therefore, absolutely forbid its subjects to do any given thing wherever they may be, provided it do not enforce that prohibition by any act of jurisdiction exercised out of its own territories, and within those of another state. And the subject so offending may be compelled to return home, or punished on his contumaciously remaining abroad, by process against his property situated in his own country.⁹

These principles will assist us to understand the application of penal laws to persons who are subjects of more than one country at the same time. It is for the municipal law of each country to determine whether and how far its subjects shall be permitted to throw off their allegiance, and become citizens or subjects of other states. Thus, by the English Law, a natural-born subject owes an allegiance intrinsic and perpetual, which cannot be divested by any act of his own.⁷ And Chancellor Kent, after a full discussion of the subject, holds that the same rule prevails in the United States of America.⁸ Thus a natural-born subject of England or America, being incapable of throwing off his allegiance, is always amenable for criminal acts against the law of his own country. It follows, that if any foreign state naturalize him, he receives such naturalization subject to his prior and therefore superior obligation to his own country. Hence arises a conflict of duties, which may, as Lord Hale observes, entangle him in difficulties.¹ "If," says Chancellor Kent, "there should be a war between his parent state and the one to which he has attached himself, he must not arm himself against his parent state; and if he be recalled by his native government, he must return or incur the pains and penalties of a contempt. Under these disabilities, all the civilized nations of Europe adopt (each according to its own laws) the natural-born subjects of other countries."² It follows that neither country can complain, if the other duly enforces its rights over such a person. To prevent these difficulties, it is most convenient not to naturalize strangers, except so far as they can throw off their obligations to their parent state. And as there is nothing in Public Law against the power of a subject to emigrate and throw off his native

⁹ Voet ad Pand. lib. 1, tit. 4, par. 2, De Statutis, § 9.

⁷ *Story's case*, Dyer, 298 b, 300 b; Bla. Com. b. 1, pp. 370, 371; 1 Hale, Pleas of the Crown, 68; Foster, Crown Law, 59.

⁸ Kent, Comment. vol. 2, lect. 25, p. 48 or 49.

¹ 1 Hale, Pleas of the Crown, 68.

² Kent, *ubi sup.* p. 50.

country altogether,² this is a matter regulated by the municipal laws of each state.³ Thus, by the French law, a French subject loses his quality of a Frenchman by being naturalized in another country,⁴ for the French law holds that no one can have two countries.⁵

The possession of property may make a person liable to the criminal law of a foreign country, even though he be not within its territories. Every state is at liberty to grant or refuse to foreigners the privilege of holding land or other immovable property in its dominions. If it do grant that privilege, the property of such strangers is subject to the laws and jurisdiction and taxes of the country. For the jurisdiction of the sovereign power extends to the whole territory, and it would be impossible to except any portions because they are held by foreigners. And as the sovereign may refuse to foreigners the faculty of possessing lands within the state, so that faculty may be granted subject to express or implied conditions.⁶ It follows that the immovable property of foreigners may be liable to forfeiture, or other process of law, for offences against the law of the country where it is situated, in the same manner as it would be if possessed by subjects of that country. There is in this no violation of the sovereign rights of the state to which such foreigner belongs; for that state may forbid its subjects to hold land elsewhere, and if it permit them to do so, that permission must be subject to the *lex loci rei sitæ*.

We have now to consider whether a crime committed in one state, against the law of that state, may be punished on demand in another state where the offender is afterwards found.

The English authorities decide this question in the negative, holding the general rule that the penal laws of one country cannot be taken notice of in another, for penal laws of foreign countries are strictly local.⁷ And the common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed,⁸ though we have seen an important exception to this position, introduced by statute regarding treasons committed in foreign countries by subjects of the British Crown. The same rule prevails in the United States of America.⁹ And so far as crimes and offences are

² Grotius, *Dr. de la G.* l. 2, ch. 5, § 24; Pufend. *Droit des Gens*, l. 8, ch. 2, § 2, 3; Vattel, *Droit des Gens*, liv. 1, ch. 19, § 220, 223, 225.

³ Vattel, *ubi sup.* § 222.

⁴ Cod. Napol. art. 17.

⁵ Sirey, l. 27, i. 53.

⁶ Vattel, *Droit des Gens*, liv. 1, ch. 8, § 114.

⁷ *Ogden v. Folliott*, 3 T. R. 733, 734; *Wolff v. Ozholm*, 6 M. & S. 99.

⁸ Story, *Conflict of Laws*, § 620.

⁹ *Ibi*, § 621.

looked upon simply as violations of Municipal Law, it is in accordance with the principles of Public Law. For we have seen that the direct object of the administration of criminal justice by the civil superior is the benefit of the citizens of the state;¹ and punishments are designed for the public security of the community, as a means of municipal government.² And so Pardessus says, that the general practice of nations is to leave the prosecution and punishment of offences to the tribunals of the country where they are committed.³ Merlin enters rather fully into arguments to establish this position. He supposes the case of an Englishman tried before a French court for an offence committed in England. He argues that the prisoner himself could have no confidence that justice would be administered in such a case; that the court would be unqualified to decide, and the evidence difficult to obtain, and lastly, that the example, which is the chief object of punishments, would have little beneficial effect, because the offence was committed in another land, and against other laws. He cites, in support of his opinion, the authority of Covarruvias, Farinacius, Baldus, Julius Clarus, and many others.⁴

This seems to be the sounder doctrine, though Paul Voet and Hierius contend that crimes committed in one state may, if the criminal be found in another state, be upon demand punished there.⁵ No doubt if this last opinion were acted upon, the conclusion of Story is correct, that the rule of Bartolus points out that the law of the place where the offence was committed should prevail in the trial of the offender. *Delicta puniuntur juxta mores loci commissi delicti.*⁶

The principles above laid down will assist us to determine what ought, by the comity of nations, to be the effect of foreign judgments in criminal cases. In the first place, a country which allows prosecution before its tribunals for an offence committed abroad, against the law of the foreign country, ought to admit, as conclusive, a judgment of a competent tribunal in that country for or against the defendant. This is evident, because the law of the foreign country must be the rule in such case, and by that law, the person accused has already received judgment, and that judgment must be conclusive, so far as it would be so by the law of the place where the offence was committed, and where it was in the first instance cognizable.

But in a country which does not enforce the criminal laws of other

¹ Boehmeri Elem. Jur. Crim. § 2, c. 1.

² Cremani, De Jur. Crim. lib. 1, pars 2, cap. 4, § 1, p. 124.

³ Pardessus, Droit Commercial, 5, art. 1467.

⁴ Merlin, Repertoire, article Souveraineté, vol. 16, pp. 399, 400.

⁵ Story, Conflict of Laws, § 625; P. Voet, De Statutis, § 4, c. 2, 26.

⁶ Ibi.

states, it would be difficult to maintain that foreign criminal judgments ought, by comity, to be executed or admitted as producing legal effects, beyond the territories of the foreign state, or the civil status and capacity of the person. With this limitation the opinion of Hertius and Boullenois, cited by Story, may be received, that the state or condition of a person, resulting from a judgment pronouncing civil death or legal infamy, or any other incapacity, extends everywhere.^m This is so in a country which gives effect to foreign criminal laws; but the sounder general rule is that laid down by Lord Loughborough, Lord Ellenborough and Lord Brougham, that a criminal judgment does not affect the legal status or capacity of any one out of the territory of the country to which the court belongs.ⁿ The reasons of Public Law on which this conclusion is grounded require full consideration. They will also show why as a general rule the criminal laws and judgments of one country are not carried into effect in another.

The general intercourse and affairs of mankind do not require that criminal laws and judgments should have an equally extensive effect with civil laws and decisions of courts. For it frequently happens, that a contract made in one country cannot fulfil the intentions of the parties, nor answer the purpose for which the transaction is intended, unless it take effect and be performed in another country. Without this extension of legal rights and obligations from one territory to another, the intercourse of mankind would be greatly impeded. But it is otherwise with regard to criminal matters. For if sufficient means be taken to provide that offences be tried and punished in the country where, or against the laws of which, they are committed, the objects of criminal laws will be attained. Criminal or penal law has a relation both to private and to Public Law,^o but it is collateral to the Civil, Public and Private Law in every state, and intended for the protection of rights, and the restraint of persons who violate the order of society by breaking the laws which regulate it. The right of punishing is inherent in the sovereign civil power, because it is necessary for the end of civil society;^p and under this aspect it is part of the Public Law of each state. These reflections show that in criminal law, the municipal spirit predominates. And thus we have seen that the power of punishing, as it is exercised in the world, belongs not to natural, but to civil society, which is municipal, and not universal, because it involves the institution of civil societies and the division of mankind into na-

^m Story, § 620.

ⁿ *Folliott v. Ogden*, 1 H. Bl. ; *Wolff v. Oxholm*, 6 M. & S. 99 ; *Warrender v. Warrender*, 9 Bligh, 119, 120 ; *Ogden v. Folliott*, 3 T. R. 733, 734.

^o See my *Readings*, 1850, p. 139.

^p *Zallinger*, *Inst. Jur. Eccles. lib. 5, Decretal. p. 11, § 4.*

tions and states, having separate governments. Therefore Montesquieu distinguishes the spirit of criminal law in different countries according to the form of the government.⁴ And it is clear that an act prejudicial to society in one country, and therefore punishable there, may be far less so, or indeed harmless, in another. These observations suffice to show why it is not the duty of any state to enforce or carry into effect the criminal law and decisions of a foreign state.

The question remains to be considered, whether a nation ought to surrender up fugitives from justice who seek in its territories an asylum from punishment, and thus remit them to the proper jurisdiction.

One general reflection applies to this important subject. Though the municipal spirit has so great a part in criminal laws, yet they must (like civil laws) be considered under two aspects, first, as the laws of a particular country, and secondly, as part of the general system of laws which govern human society as a whole. And in one sense, the celebrated law of Gajus—*Omnes populi*—applies to criminal laws, for some rules of criminal law are, or ought to be, common to all mankind, because they are immutable. Such are the laws which forbid acts contrary to natural law, either primary or secondary, though under different penalties more or less adapted to the circumstances of the particular place.⁵ And indeed we have seen that the very power of punishing is derived from the principle of natural law establishing the right of defence against injuries, as laid down by Florentinus.⁶ And as all laws are consequences, direct or remote, of the two primary laws, it follows, that the penalties or punishments by which obedience to them is procured, and violations of their provisions prevented or discouraged, must be looked upon as one means whereby the government of the world is maintained, and the two primary laws are put in execution. Thus Papinian and Modestinus describe municipal law, as not merely giving a rule of conduct, but also restraining and punishing offences.⁷ Such is the relation of criminal law to the law of nature, or immutable law, and to the general order of society constructed both on immutable and on arbitrary laws. These doctrines lead to the conclusion that, in general, a nation should not lend itself

⁴ Montesquieu, *Esprit des Loix*, lib. 3, ch. 5.

⁵ L. 9, ff. De Just. et Jur.

⁶ So killing and wounding, and other injuries to persons, are offences against primary natural law. L. 10, § 1, ff. De Just. et Jur. And theft is against secondary natural law. L. 1, § 3, ff. De Furtis.

⁷ L. 3, ff. De Just. et Jur.

⁸ L. 1, 3, ff. De Legibus.

to defeat the criminal laws of another state by screening criminals from punishment.

Humanity prescribes that an asylum should be granted to foreigners who, having committed no crime, driven out of their own country, seek a retreat elsewhere, provided they obey the laws of the country which receives them, and do nothing that can cause any disturbance.^a But the greater number of moralists hold that each state has a right to judge whether or no it be prudent or expedient to permit foreigners to enter its territories, who are not driven there by necessity, or by some cause which entitles them to compassion.^b And though, as Pufendorf observes, it would be inhuman to refuse hospitality to a small number of strangers exiled from their own country for no crime,^c it is clear that every state may, without incurring the charge of cruelty, close its frontiers against all who have committed offences elsewhere, and who fly from trial or from punishment. And this course is prudent and politic with reference both to the foreign relations and the internal order of the country.

Grotius argues, that though the establishment of civil societies gave to the government of each state the right of punishing or not punishing, as might be most convenient, the offences of its subjects against the laws of the community of which they are members, yet that institution did not vest in such governments so absolute and unlimited a discretion regarding crimes which in some measure affect human society in general. For other states have a right to prosecute such crimes, on the same principle that the laws of a particular state give to all private individuals the right of prosecuting in certain cases.^d And *a fortiori*, foreign states have this right when the crimes in question are offences especially against themselves, and which they are entitled to punish for the maintenance of their safety or their honour. Grotius concludes that a state having within its territories a foreign offender ought not to throw any obstacle in the way of a foreign government which has a right to punish him.^e He adds that a state does not ordinarily allow any foreign power to use armed force within its territories, a practice which would be subject to serious inconveniences. Therefore a state in whose country there is an offender convicted by a foreign court ought either to punish him itself, or to deliver him up on demand to the other state

^a Grotius, *Droit de la Guerre*, l. 2, ch. 2, § 16; Pufend. *Droit des Gens*, liv. 3, ch. 3, § 10.

^b Pufend. *Droit des Gens*, l. 3, ch. 3, § 9; Vattel, *Droit des Gens*, liv. 2, ch. 7, § 94.

^c Pufend. *ibi*, § 10.

^d Grot. *Droit de la Guerre*, l. 2, c. 21, § 3; Pand. lib. 47, tit. 23.

^e Grot. *ibi*.

to whose jurisdiction he is amenable.^c Grotius deduces his opinion from the doctrine, that a civil society, as any other body politic, may become responsible for the act of an individual,^d on the principle that any one cognizant of a crime and who could have prevented it, and ought to have prevented it, and does not do so, is himself guilty.^e And he argues that as this doctrine is of natural law, it is applicable to the liability of a state for the acts of its subjects. And that in like manner a state is also liable if it afford a retreat to an offender and so prevent his being punished.^f Every state is bound to protect its subjects against injury; and whoever injures them, offends against their country, which is bound to punish the offender, and oblige him, if possible, to compensate the injured man.^g On the other hand, every state is obliged not to permit its subjects to injure those of foreign countries.^h But a state is not responsible for the act of its subject unless it in some way approve or ratify that act, in which case it becomes liable. Therefore if the offender return home, justice should be demanded from his sovereign, who is bound, if possible, to repair the damage committed or to punish him, or else to deliver him up to the injured state.ⁱ And a sovereign who refuses to make compensation for the injury done by his subject, or to punish the offender, or to deliver him up, becomes in some manner an accomplice to the injury, and is responsible for it.^k Vattel judiciously adds, that a nation is also responsible for the offences of its members when its customs, and the principles of its government, accustom and allow its subjects to indulge in common pillage and piracy, as was the case with the Usbecks and the Barbary Powers.^l

These doctrines have a bearing on the law of extradition of foreign criminals. The arguments of Grotius, and the reflections which I have made above on the way in which the jurisdictions of separate states concur for the general government of human society, and are thus part of the scheme by which the world is governed, show that his position regarding extradition is generally the correct rule of Public Law. But it is liable to some modifications, which we will now consider.

The arguments of Grotius chiefly apply to an offence committed by a subject of one state against another state, or its subjects, in which

^c Grot. *ibid.* § 4. And see note 1 of Barbeyrac.

^d *Ibid.* § 2.

^e *Ibid.* num. 2. And see the authorities cited.

^f *Ibid.* § 3.

^g Vattel, *Droit des Gens*, liv. 2, ch. 6, § 71.

^h *Ibid.* § 72; Blackst. *Com. b.* 4, ch. 5, p. 67.

ⁱ Vattel, *ibid.* § 73—75.

^k *Ibid.* § 76.

^l *Ibid.* § 77; Burlamaqui, *Droit des Gens*, edit. Dupin, tom. 4, p. 448, part 3, ch. 2, § 3, 8.

case he shows that by screening the offender, and refusing redress, the whole body politic may become responsible for the act of one of its members. But with regard to the extradition of foreign convicted criminals by a state in whose dominions they have taken refuge, Grotius does not carry his argument so far, though he says that the offender ought to be delivered up or punished.

The duty of delivering up such criminals is not in general one which can be enforced by a declaration of war.^m It is not a common and indispensable obligation, except by virtue of some treaty, or where the refugee is engaged within the territory in which he has found a refuge in some hostile design against the country from which he escaped.ⁿ For actions punishable in one country may be innocent, or even praiseworthy, by the laws of another, and we have seen that each state may judge for itself what foreign laws it will act upon or reject within its territories. And the laws of evidence and criminal procedure in different countries vary greatly, so that a trial and conviction perfectly conclusive and satisfactory in the country where the Court sat, may be held entirely the contrary in another. Therefore, admitting the right of demanding extradition, it would be impossible to define, practically, the limits of that right, except by treaty. Kent holds that it is the duty of the government to surrender fugitives upon demand of a foreign state, after the civil magistrate shall have ascertained the existence of reasonable grounds for the charge, and sufficient to put the accused on his trial. But he adds that the difficulty, in the absence of positive agreement, consists in drawing the line between the class of offences to which the usage of nations does, and to which it does not, apply; inasmuch as it is understood, in practice, to apply only to crimes of great atrocity, or deeply affecting the public safety.^o We may conclude that in general the extradition of offenders rests, not on strict right, but on the comity of nations, excepting where it is secured by treaty.^p

Cases may, however, occur in which the duty of delivering up or punishing, or at least of not sheltering a foreign criminal, may be absolutely and strictly binding. Thus a state giving hospitality and protection to a foreigner who has attempted the life of a foreign sovereign, or of any other person sacred by Public Law, might be justly called to account by the injured nation. To a case of this description the opinion of Kent regarding atrocious crimes would apply. So we

^m Pufend. *Droit des Gens*, liv. 8, ch. 6, § 12; P. Voet, *De Statutis*, § 2, c. 1, n. 6.

ⁿ Pufend. *ibi*.

^o Kent, *Comment*. vol. 1, lect. 2, p. 37.

^p See the authorities cited by Story, *Conflict of Laws*, § 628. On the subject of extradition, see *Hansard*, *Parl.* Dec. 1852, vol. 122, 3rd series, col. 192, &c., 498, &c., 561, 1278.

have seen that Pufendorf, while he holds that the right of requiring extradition of foreign criminals is not based on indispensable obligation, excepts the case of refugees who abuse the hospitality accorded to them, by hostile designs against the country which they have left. No country can give an asylum for conspiracy, or the preparation of hostilities, against another state, without violating the law of nations.⁴ The reason of this is easily perceived. The establishment of civil societies has deprived individuals of the right of war, and vested it in sovereign powers alone: 'and individuals or societies not sovereign can, where civil society exists, use force in those cases only in which the public authority cannot protect them.'⁵ Without this restriction, peace, which is one of the chief ends of civil society, could not be maintained; and as Natural Law allows an appeal to violent means only where force is necessary for the defence and the maintenance of rights,⁶ it follows that wherever civil society has rendered the use of force unnecessary for those purposes, it is also unlawful. Therefore any one not invested with sovereignty who commits or designs and prepares any act of hostility against any state, is guilty of an offence against the Law of Nations, unless he be authorized to do so by a sovereign power.⁷ Now it follows from the axiom that the authority of each sovereign power is exclusive, within its territories, of every other temporal sovereignty, that no state can authorize any act of hostility, or the preparation of any such act, against a third party, in the territories of an independent state, without the permission of the latter. And on the other hand, a government permitting, even by neglect, a breach of the Law of Nations to be committed within its territories, is itself liable for the offence, because a body politic is responsible for any act of individuals which it ought to prevent, and might have prevented.⁸ And a state is, *prima facie*, responsible for whatever is done within its jurisdiction, for that jurisdiction is presumed to be capable of preventing or punishing offences there. This indeed is necessary for the maintenance of the peace of the world, in which all states ought to concur. These arguments apply with peculiar force to the case of refugees who escape from the violated laws of their own country, and conspire against it in that which has given

⁴ See the opinions of Lord Aberdeen and Lord Lyndhurst, in the House of Lords, Hansard, Parl. Deb. vol. 115, col. 628, 3rd series, 1851.

⁵ Vattel, *Droit des Gens*, liv. 3, ch. 1, § 4; Pufend. liv. 8, ch. 6, § 8.

⁶ *Ibi*, l. 156, ff. *De Reg. Jur.*; l. 13, ff. *Quod Metua Causa*; Gravina, *Histor. de Ortu et Progressu Jur. Civ.* c. 91.

⁷ Vattel, *ubi sup.*

⁸ L. 24, ff. *De Captiv. et Postlimin.*; l. 168, ff. *De Verbor. Signif.*

⁹ Grotius, *Droit de la Guerre*, liv. 2, ch. 21, § 2; Decree of Gratian, *caus. 23, quest. 3 can. 11*; Pufend. *Droit des Gens*, liv. 1, ch. 5, § ult.; l. 50, ff. *De Reg. Jur.*

them hospitality. For, by the comity of nations, an asylum would be denied to them; and therefore they are peculiarly bound to commit no abuse of the hospitality given as a matter of humanity, which indeed demands that favour only for persons driven from their own country without having broken its laws.⁷

With regard to political offenders, that part of the comity of nations which we have been discussing presents peculiar difficulties. On the one hand it is for the common peace of the world that offences against the security of existing governments should be prevented or punished, and revolutions repressed; while on the other, the policy and opinions of nations vary so greatly regarding civil government and administration, that a man may be pursued as a traitor in one country, and welcomed as a patriot or a loyal subject in another. Each state, therefore, deals with these cases according to its own policy, and with reference to its own internal constitution and security. Thus the United States of America could scarcely reject an exiled republican; and Austria would receive with honour a partizan of the elder branch of the house of Bourbon. The principle of England is to close her ports to no political refugee. The dethroned monarch, the usurper in misfortune, and the unsuccessful demagogue, nay, even the fanatical enemy of all authority, alike find peace and safety on our shores. The present condition of Europe, as well as recent experience, seem to preclude foreign governments from complaining of a common sanctuary, which the uncertainty of political events renders by no means matter of indifference to the public men of all countries, none of whom can be sure that they may not, at some time or other, rejoice to claim its protection. Whatever general reasons exist against sanctuaries or asylums for offenders, may, to some extent, be urged against the rejection of the comity of nations respecting the extradition of foreign offenders. The same principles are applicable to both cases. In both the impunity of crime is procured, and the efficacy of laws weakened. Treaties for the extradition or punishment of foreign criminals are therefore highly favourable to good order and civilization.

Kent informs us, that the European nations, in early periods of modern history, made provision, by treaty, for the mutual surrender of criminals seeking refuge from justice. Treaties of this kind were made between England and Scotland in 1174, and England and France in 1308, and France and Savoy in 1385, and the last treaty made special provisions for the surrender of criminals, though they should happen to be subjects of the state to which they had fled. One treaty between Great Britain and the United States, concluded in 1795, con-

⁷ Pufend. *Droit des Gens*, liv. 3, ch. 3, § 10.

tained an agreement for the mutual surrender of persons charged with murder or forgery. That treaty expired, on this point, after twelve years. The legislature of the kingdom of Belgium, by a law of the 1st of October, 1833, authorized the surrender of the fugitives from foreign countries upon the charge of murder, rape, arson, counterfeiting the current coin, or forging public bank paper, perjury, robbery, theft, peculation by trustees, and fraudulent bankrupts, but with a proviso that the law of foreign countries be reciprocal in the case, and that the judgment or judicial accusation be duly authenticated, and the demand be made within the time of limitation prescribed by the Belgian Law.*

We have now examined the whole range of the Conflict of Laws in its public aspect, that is to say, not so much affording rules for the decision of questions of private right, as showing the way in which the municipal laws of different countries operate in the government of society where they come in contact with each other. Some general reflections are now required.

The investigation of the nature and spirit of laws led us to see the plan of society on the foundation of the two primary laws, and the relation which the state of man in this life has to the exercise of those laws. We also examined the two sorts of engagements by which God forms the order of society, and unites mankind together therein.* And thus it was shown that the whole scheme and system of human society and government is constructed of laws, and obligations arising from laws. If we analyze human society, commencing with its first element, the family, and then proceeding to the state or nation (*civitas*) and then the world or mankind in general, we shall find at each step difficulty and danger increase, and they are greatest at the last.^b St. Augustine speaks of the diversity of language among men, and the separation of nations, as the great obstacles to the peace of mankind; and he observes, that when several nations are subjugated by a more powerful one, that union frequently produces civil wars and seditions instead of peace.^c Now the laws of which the system of human society and government is constructed are, for practical purposes, municipal laws either in substance or in form. For however ready men may be to acknowledge the intrinsic authority of natural or immutable laws, yet, for the most part, the form in which those laws are obeyed

* Kent, Comment. vol. 1, lect. 2, pp. 37, 38. And see stat. 6 & 7 Vict. c. 75, regarding France; and 6 & 7 Vict. c. 76, regarding America; and stat. 8 & 9 Vict. c. 120, for facilitating the execution of treaties with France and America for the apprehension of certain offenders.

* Domat, Loix Civiles, Traité des Loix, ch. 2.

^b Div. August. De Civ. Dei, lib. 19, cap. 7.

^c Ibi.

or enforced is that of municipal laws; and obedience to them is secured by means of the sovereign power in each state or nation, through the medium of divers magistrates and officers. And the other class—mutable or arbitrary laws (those alluded to in the Pandects by Gajus, as peculiar to each people)⁴—are, in substance as well as form, municipal, deriving their authority from the civil power. Those municipal laws of both kinds constitute in each country the basis of the social and civil polity on which the peace of the world depends, although that polity in its essential parts is of natural law. But municipal laws, considered as such, do not extend beyond the territorial jurisdiction of the state to which they belong. And here we perceive a difficulty in the system of human polity considered as a whole embracing all mankind. For not only states and those who represent their sovereignty are not subject to any common legislative or judicial authority on earth, but, as we have seen, the laws of different countries frequently clash in such a way that either certain matters must be regulated by no law at all, or the law of one country must give way to that of another. Before civilization had developed a mode of diminishing, if not of solving these difficulties, they caused a great part of the wars and dissensions of which we read in history. This is easy to understand. The same reasons by which Suarez proves the necessity of a legislative power and municipal laws in a civil community,⁵ also show by implication the evils which arise for want of the same institutions to regulate and govern the general community of mankind. And the equality and independence of nations render their legal relations like those of individuals in a state anterior to civil society, that is to say, in an imperfect association greatly inferior to that of civil society, especially with reference to the great requisites of peace and the security of rights. Yet the division of the world into states and nations is an institution introduced *jure gentium*.⁶ And it is a great feature of the constitution of the world. But this subject has already been considered, and it is adverted to here only for the purpose of showing the general object and spirit of the branch of jurisprudence which gives effect to municipal laws in cases of conflict. The jurisprudence of the conflict of laws does not seek to be a common law overriding the conflicting municipal laws. Such a law would interfere with the peculiarities of municipal laws which make them adapted to the circumstances of the places where they prevail. And it would be at variance with the distinctions of nations and states, each of which has

⁴ L. 9, ff. De Just. et Jur.

⁵ Suarez, De Legib. lib. 3, cap. 1.

⁶ *Ex hoc jure (gentium)* . . . *diacreta gentes, regna condita* . . . Hermodenianus, l. 5, ff. De Just. et Jur.

laws, usages and institutions more or less adapted to its own wants and the character of its people. But this jurisprudence shows, wherever there is a conflict, which of the inconsistent laws is to govern a given state of facts. It thus allows due effect to municipal laws, and yet prevents their peculiarities from forming an impediment to the free intercourse of mankind for all the purposes of commerce and civilized life. And it applies to the municipal laws of different states, where they come in contact with each other, a system of rules in accordance with the general scheme whereby the world is governed. These observations easily indicate the connection between those rules and the two primary fundamental laws. For they all have a principle of justice either belonging to immutable law or else arising from an adaptation to the order of society, which is constructed upon those two primary laws. And they have reference to the ultimate end of all laws, which is that for which man was created. Thus the rule, that where a contract is entered into in one country, and the performance or fulfilment is intended to be in another, such performance must be according to the law of the latter place, is matter of immutable law, because good faith requires that the manifest intentions of the parties should be carried into effect, and they contemplated the law of that place. And the rule, that a marriage celebrated according to the *lex loci contractus*, is valid everywhere, rests on a principle of the order of society, as we have seen. And so it is with the rule which gives effect to the judgments or decrees *in rem* of foreign courts having jurisdiction over the subject matter. These rules all belong to the terrestrial order and peace of which St. Augustine speaks, where he says, that the portion of the Celestial City which is here on earth, though it has no concern with the diversity of languages, laws, customs and nations, yet uses that peace, referring it to the ultimate end or *civitas Dei*.^a And the same passage applies particularly to International Law, as it does generally to the whole science of jurisprudence. For the innumerable multitude of rules which govern mankind all bear some relation to the two primary laws, and are the laws of man's conduct, which consists of the steps which he makes towards the end of his creation.^b

A few observations on the subject-matter of laws will further explain the spirit of this head of jurisprudence. Laws may be divided under two heads, i. e. obligations and successions. The first comprises the legal relations of persons, and the second the mode in which those relations are perpetuated by transmission from one generation to another. Any one who examines the practical operation of these two heads of law, even within his own personal observation, will perceive

^a Div. August. De Civ. Dei, lib. 19, cap. 17.

^b Domat, Loix Civiles, Traité des Loix, ch. 1, § 3.

that they constitute a vast complication of details, forming a sort of network, which extends throughout the whole of human society. And he will also see that the unbroken continuity of that network, notwithstanding the political and geographical divisions of the earth, is necessary for the entire fulfilment of all the purposes of civilized society. And this object could not be obtained without the comity of nations, which gives effect to laws beyond their own proper territory, in cases where such comity is required by the interests of society.

These reflections show the province and the spirit of the comity of nations regarding the conflict of laws, and the effects which it is intended to produce in the scheme of terrestrial government. The foregoing chapters do not pretend to contain a complete treatise on this head of jurisprudence. They only give so much of the rules and cases as seemed necessary to afford a full view of the subject, which is an essential part of Public Law.

CHAPTER XVIII.

OF THE LEGAL ORIGIN AND NATURE OF CIVIL SOCIETIES OR STATES.

The Three Parts or Orders of Human Society—Matters of Public and of Private Law—Detail of the Matters of Public Law, and Construction of Civil Society—Necessity of Civil Government, and its Divine Right—The Doctrine of the Social Compact—Doctrine of Hooker, Blackstone, Pufendorf, Hobbes, Grotius, Zallinger, Locke, and Barbeyrac—The true Origin of Civil Societies—Savigny's Doctrine on the Subject.

THE preceding chapters have shown the first principles and foundations of the order of society, and the general nature and spirit of the laws constituting and regulating that order. A plan of society has been drawn on that foundation of the two primary laws.¹ We have seen that God forms the order thereof by means of the ties which engage men in society to bind them together in the exercise of the second law. We have shown how these ties or engagements imply and require the use and advantage of civil government to restrain every one within the order of those which belong to him. And we have also seen that there are four foundations of the order of society in its present state, that is to say, the authority of true Religion, the government of God over society, the general knowledge of justice in men, and the autho-

¹ See Chap. VI.

city which God gives to supreme civil powers. In the course of these disquisitions, some of the chief doctrines regarding the origin and nature of civil communities or states have necessarily appeared, because the explanation of the way in which society is constructed and maintained, and of its objects, that are the design of God in uniting men together in society according to the spirit of the two primary laws, naturally shows what civil or politic societies are, and what they are intended to accomplish in the world. For, as Burlamaqui justly says, civil society is natural society so modified as to have a sovereign power which commands, and from the will of which all that regards the happiness of society depends in the last resort, so that by such means men may more surely obtain the happiness which they naturally seek.³ But this subject must now be more fully explained.

Domat lays it down in the Preface to his great work on Public Law, that God has made the universal society of mankind to subsist by three ties, which distinguish it into three parts, according to so many ways in which the Divine system appointed for the world operates.

The first of these is Religion, the spirit of which embraces all people, and tends to bring all nations into the bosom of the Catholic Church.

The second is that humanity, or common human nature, which ought to unite all mankind, notwithstanding differences of religion.

The third is that constituted in each state, by the order which unites all the families composing it under the same government, whatever religion they may profess. And as these three different parts of universal society have their different relations to the common good, and to the different engagements and duties of men, so the subject-matter of their laws, and also those laws themselves, have their diversities adapted to their uses.¹ The first of these parts or orders comprehends all the matters relating to the good order of society with respect to Divine worship. The subject-matter of the laws contained in the second part of society, which is constituted and supported among nations by humanity and natural justice, common to all mankind, is, the use of commerce, and the several communications and intercourse between nations and the subjects of one state with those of another, the liberty of passing from one country to another, the freedom of navigation, honesty in international commerce, hospitality, and other things of that nature. They have rendered necessary negotiations, treaties between nations, embassies, and the privileges of ambassadors and other diplomatic envoys. And even in war there are laws of humanity and justice. Such are those which regard the manner of declaring

³ Burlamaqui, *Droit des Gens*, vol. 4, p. 15, edit. Dupin.

¹ Domat, *Droit Publ* Preface.

and making war, the rights of hostages, humanity towards prisoners, moderation in acts of hostility, the observance of treaties of peace, truces and suspensions of arms, the use of reprisals, and the like.

Domat distinguishes, as to what relates to these international matters, between Christian nations and others. For the latter have for laws, common to them all, the rules of humanity and justice which compose the Law of Nations, besides treaties and established usages. But those who know the Christian religion have, besides natural equity and treaties and international usages, the laws of Religion also, which comprehends within its bounds all duties of every nature; and which not only contains rules more perfect than those barely derived from the law of nature, but also secures a more strict and religious observance of the rules of the law of nature themselves.^m

As to the third part or order of society, which is confined to the persons united in one state under one government, Domat distinguishes the matters arising from it into two sorts. The first is of the matters which concern the general order of the state, such as those relating to the government; the authority of the sovereign and the obedience due by subjects or citizens; the force necessary to preserve public tranquillity; the management of the revenue; the order of the administration of justice; the punishment of crimes; the functions of different sorts of offices, employments and professions which the public service requires; the public policy for the use of the seas, of rivers, of highways, of mines, of forests, of game and fishing, of the government of towns and other places; the distinctions of the different orders of persons, and other matters of like nature.

The second sort of matters of this third order of society is of those which relate to what is transacted between persons in their private capacity, their several engagements, whether by contracts, such as sales, exchanges, hiring and letting, loans, deposits, partnership, donation, compromises, and the like; or without contract, such as guardianships, prescription, successions, wills, entails and others. The first sort of matters, having relation to the public order of the state, belong to Public Law; and those of the second sort, respecting only what passes among particular persons, are the matters of the other part of the law which is called private law.ⁿ

Having drawn a general plan of society, Domat proceeds thus to notice the detail of the matters of Public Law. "In order to give a view of the matters of Public Law, it is necessary to observe in general, that as Public Law is a system of rules respecting the order of the government and policy of a state, the first object presented by the

^m Domat, *Droit Publ.* Preface.

ⁿ *Ibi.* And see above, Chap. XII. of these Commentaries.

system consists of such order and policy. And it is necessary to see in the first place what are their necessity and use, for the rules of Public Law are built on that foundation.

"The design of God in uniting men together in society for the purpose of uniting them by the spirit of the two primary laws, as has been explained in the Treatise of Laws, implies the necessity of a subordination among them which should place some of them above the others. For this society constitutes a body of which every one is a member; and as the body is composed of different members, so there is a subordination, not only of all the members under the head, but also of the members among themselves, according as the functions of one depend on those of others. Thus as the body of the (civil) society is compounded of an infinite number of different conditions and professions necessary for the common good; it is essential to that society, that there should be a subordination of all conditions and professions under one power intended to maintain the order of the whole society; and that those conditions and professions should be subordinated one to the other according as the functions of one may depend upon or have relation to another. And the necessity of this order implies that of government, especially in the condition in which we are, under so strong an influence of self-love impelling us to serve our own interests and gratify our passions, which would destroy the order of society if the authority of government did not moderate and curb them by inflicting punishment on those who attempt to disturb that order."

"But even if we could suppose a society of men without self-love, yet the subordination of some of them to others would be necessary for the things which they would have to transact together. And the necessity of assembling, of proposing matters, of deliberating and of executing what is resolved on, would require an order of subordination among them, placing some in authority over the others, whether it were by reason of the nature of their functions, or by the difference of age or capacity, or the majority of votes, or other reasons."*

Domat here defines that part of municipal law which is called Internal Public Law, to be the system of rules regarding the order and of government and the polity of a state. And he lays it down that all the rules of Public Law are built on the necessity and use of that general law. Thereby he indicates the true origin of civil societies or states. The division of mankind into distinct communities called nations, states, kingdoms or countries, is, as we have seen, one of that class of laws called by the civilians *jus necessarium*, or, in the words

* Domat, Droit Publ. Preface.

of Modestinus, *jus quod necessitas constituit*.⁷ It arose out of the nature of things and the exigencies of mankind, though hastened in its first commencement by a peculiar dispensation. The social state could not exist without civil government, which requires and implies the institution of civil societies, that is to say, the introduction of a sovereign power into natural society, and the partition of mankind into separate bodies politic for the purposes of government. Thus Hermogenianus refers the division of nations and the foundation of kingdoms to the *jus gentium*, or natural law. *Ex hoc jure gentium . . . discretæ gentes; regna condita*.⁸ He mentions first the division of mankind into nations, and then the institution of governments, showing the former to have been required for the latter, both springing from the same source, the Law of Nature, which he, after the manner of his time, calls *jus gentium*.

We shall find this view of the origin of civil states confirmed by further examination. Suarez, in that part of his work which relates to the sovereign power of making laws, argues that this supreme legislative authority, which is the great feature of sovereignty, does not spring from the will of men, but is of Divine right. For it is a necessary part of a state or civil community. It is an essential incident of civil society.⁹ He goes on to say, that the civil power of government is of natural law, if viewed abstractedly, but the mode or form of exercising it may be determined by the particular community in which it is in the first instance vested. That power looked upon *per se* is just, and in conformity with the Divine Will; and supposing it vested in a given person or persons, the obligation of obeying him or them is of Divine right. The same principles apply to every form of civil polity.¹⁰ Thus Covarruvias, citing St. Thomas Aquinas and others, argues that municipal laws, as such, are binding in conscience, because the power of making laws is of natural law.¹¹ And Pufendorf, though he holds sovereignty to result immediately from contract or agreement, maintains that the authority of sovereign power is both of Divine and of human right. Since the increase of mankind, he says, reason has shown beyond contradiction, that the establishment of civil societies is absolutely necessary for the order, the peace and the preservation of the human species. Therefore God, as the author of the Law of Nature, must also be looked upon as the founder of civil societies, and consequently of sovereign power, without which they cannot exist. For, he conti-

⁷ L. 4, ff. De Legib.; l. 2, ff. De Orig. Jur.; and see my Readings, p. 125.

⁸ L. 5, ff. De Legib.

⁹ Suarez, De Legib. lib. 3, cap. 3.

¹⁰ *Ibi*, cap. 10.

¹¹ Covarruvias, Op. tom. 1, p. 199.

nues, we must refer to a Divine origin, not only the establishments made directly by God's order, and without the intervention of any human act, but also those which men themselves have invented by the light of reason, according as circumstances of time and place required it, in order to acquit themselves of obligations imposed by some Divine Law. Therefore, as the duties of natural law could not be conveniently performed, since the great multiplication of mankind, without civil government, it is clear that God, who has prescribed that law to men, has thereby commanded them to form civil societies. And we see that in the sacred Scriptures He formally approves the authority of sovereigns, and shows that it proceeds from Himself. But it is not certain that God has commanded the establishment of this or that particular society." Civil societies are an institution differing from other human establishments invented by the light of reason, but not shown by reason to be necessary for the order of society and the preservation of mankind. For God has here declared His will by means of reason, proving to men that without the establishment of civil societies, order and peace, which are immediate objects of natural law, could not be maintained in the world. And when Grotius says that men were not led to form civil societies by any command of God, we must understand him to mean only that there is no express Divine command to that effect, for he adds, that men found the insufficiency of separate families, and therefore they established civil societies. Reason produced this result. And he observes, that St. Paul treats them as Divine establishments, because God approved them as salutary to mankind.*

These results agree with the principles of Domat regarding the distinction between arbitrary and immutable laws. For all the laws regarding the conduct of men among themselves are the rules of the social state in which God has placed them. Those laws differ according to their relation to the order of society; and whatever be their object with regard to that order, they are consequences of the two primary laws, as I have already shown. The laws which are a necessary consequence of the two primary laws, prescribing our duty to God and to our neighbour, are essential to the order of society, and immutable. Now the institution of civil states and civil governments evidently fall under that class of laws. Those establishments have a direct relation to the end of man, to which his conduct is directed by the two primary laws. Thus we have seen that the power which God has given to civil governments, is one of the three ties by which universal society is maintained, and constitutes one of three parts or orders composing that society. So St. Augustine deduces the whole

* Pufendorf, *Droit des Gens*, liv. 7, ch. 3, § 2.

* Grot. *Droit de la G.* liv. 1, ch. 4, § 7, num. 3; Rom. xii. 1.

order of society from the two primary laws ;* and St. Thomas Aquinas argues that, as the end for which man is designed makes him a social and politic animal, and it is natural for man to live with a number of other men, it must therefore follow that there is necessarily something in man to govern a multitude. For a body of men could no more be kept together without some power to direct and govern individual wills, than a physical body could remain without a cohesive and directing power for the common welfare of all its members.[†] And he says, that the object of a multitude of men being formed into a body politic is, that they may be directed to their ultimate end, and that civil government is so much the more excellent in proportion as it is adapted to that end.[‡]

We may sum up all these doctrines and reflections by saying, that the object of civil societies and governments is the same as that of natural law ; and the arguments which we have given to show the origin and necessity of natural law and the social state, also prove those of civil societies and governments. These things have here been fully established and explained, because they constitute the foundation on which the internal Public Law of states is built, and they dispose of some theories which have produced a pernicious effect in politics.

The most remarkable of these is the opinion that civil states and governments are based upon, and derive their origin and force from, contract or agreement. The principal English advocates of this theory are Hooker and Locke. They derive the origin of government, both in right and in fact, from a primary contract, without which they say there was no reason that one man should be a superior to govern or judge another. "The lawful power," says Hooker, whose theory coincides with that of Locke, "of making laws to command whole politic societies of men, belongeth so properly unto the same entire societies, that for any prince or potentate of what kind soever upon earth, to exercise the same of himself, and not either by express commission, immediately and personally received from God, or else by authority received at first from their consent, upon whose persons they impose law, it is no better than mere tyranny. Laws they are not, therefore, which public approbation hath not made so. But approbation not only they give who personally declare their assent by voice, sign or act ; but also when others do it in their names, by right originally, at least, derived from them."[§]

* Div. August. De Civ. Dei, lib. 19, cap. 14.

† Div. Thom. Aquin. Opusc. De Regim. Princip. lib. 1, cap. 1.

‡ Ibi, cap. 14.

§ Hallam, Constit. Hist. vol. 1, p. 296, 297 ; Story, Comment. on the Constit. of the United States, vol. 1, ch. 3, § 325, and notes.

Pufendorf holds a theory founded on the same principles, though, as we have seen, his work contains the true grounds of Public Law on this important matter. He maintains that, for the regular formation of a state, there must be two conventions or compacts, and a general ordinance. For, he argues, when a multitude forsake the independence of the natural state, to form a civil society, each person, in the first place, binds himself to the others, to unite together for ever in one body, and to regulate by common consent whatever regards their preservation and common security. All in general, and each in particular, must enter into this primitive engagement, and those who are not parties to it are excluded from the new society. Then a general ordinance must be made, whereby the form of the government is established, without which no secure measures could be taken for the public welfare. Then there must be another compact, whereby, after one or more persons have been chosen, to whom the power of governing the society is given, those who are invested with that supreme authority engage to watch over the common safety and welfare, and the others at the same time promise obedience to them. This comprehends a submission of the power and will of each, so far as the public interests require, to the will of the elected chief or chiefs. The state thus formed (continues our author) is conceived under the idea of a person distinct from all the individuals composing it, which has its name, its rights, and its own property, nothing of which any citizen, or many or even all of them, have any claim to, for they belong to the sovereign. He then defines the state to be a compound moral person, the will of which, formed of the united wills of persons united by their compacts, is reputed the will of all in general, and authorized, therefore, to use the power and faculties of each individual, in order to procure the common peace and security.^b

The opinion of Hobbes resembles that of Pufendorf, but he admits of only one compact, that of each individual, with the rest, removing a portion of his free will or liberty, and so submitting to the supreme power of the state.^c Grotius defines the state in a manner compatible with these opinions, which, however, he does not sanction. The state, he says, is a perfect body of free persons, who have united together for the purpose of peaceably enjoying their rights, and for their common advantage.^d He defines it as composed of free persons, to exclude slaves, who are not persons in contemplation of law, and he uses the adjective *perfect*, according to the meaning of Aristotle, adopted by the civilians and canonists, to designate a society having within itself

^b Pufend. *Devoir de l'Homme et du Citoyen*, liv. 2, cap. 6, § 7—10; Pufend. *Droit des Gens*, lib. 7, ch. 2, § 7, 8.

^c Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* lib. 3, cap. 1, § 193.

^d Grot. *Droit de la Guerre*, liv. 1, ch. 1, § 14, and note by Barbeyrac.

every legal power necessary for its end. We will now examine the grounds of these political theories.

Zallinger, who adopts the notion of an original compact, admits that these contracts are nowhere to be found, and he therefore reduces it to a tacit compact.^c Blackstone's view is substantially the same.^d Barbeyrac, in a note to Pufendorf,^e quotes a passage from Buddeus, where he says, that though philosophy teaches that the origin of states was by compact, yet there is scarcely an instance of the sort in history, and Barbeyrac concludes that, even where such a contract existed, it was simply tacit. Pufendorf supposes a state of circumstances which never existed in point of fact, as a basis of his theory. It is, indeed, not difficult to show that the original compacts—if they be taken as the source of the obligations which keep civil society together and support civil government, and therefore as the origin of states—are a mere legal fiction or hypothesis.^f War and usurpation, and the power of a majority, have been the most frequent origin of governments, and no instance has yet been shown of a multitude, who, after living in a state of nature, entered into compacts to form a civil state. The opinion concerning a tacit original compact arises partly from the erroneous doctrine of Trebonian, which I have already refuted,^g that obligations not springing from a contract, nor from a wrong, arise *quasi ex contractu*,^h that is, from a constructive, implied or presumed contract. I have shown that the real source of this class of obligations is the law without any consent, express, implied or presumed, of the party bound, and therefore without any sort of contract. The error in question was exaggerated by Rousseau, who maintains that all obligations must arise from consent.ⁱ And on this false proposition his pernicious system is based.

Suarez holds, on the authority of the common opinion of the civilians and canonists and of St. Thomas Aquinas, that the civil power of government is primarily and immediately vested in the community or commonwealth, and derived thence by kings and other sovereign governors.^k And so Ulpian holds in the celebrated law—*quod Principi placuit*.^l But this does not confirm the opinion that states and governments derive their origin from an original compact. For the fact of a nation submitting to the authority of a given person does not neces-

^c Zallinger, *ubi sup.*

^d Blackst. Com. b. 1, p. 47.

^e Pufend. Droit des Gens, liv. 7, ch. 2, § 8, note 2.

^f Story, Comment. on the Constit. of the United States, vol. 1, ch. 3, § 327, 328.

^g Chap. VI.

^h See my Commentaries on the Modern Civil Law, ch. 11.

ⁱ Contrat Social, chap. 4.

^k Suarez, De Legib. lib. 3, cap. 4, § 2.

^l L. 1, ff. De Constitut. Princip.

sarily constitute a compact. And I have already shown, that whatever peculiar arrangements may have occurred in some instances, the essential nature of civil communities and governments is derived from natural law, and they are an intrinsic part of the order of universal human society appointed by God. The true natural state of man is a state of association or society, because it is in conformity with his nature and the obligations arising therefrom. And as those obligations bind him without his consent being necessary, so he is bound, without his consent, to live in civil or politic association and submit to civil government of some sort. He cannot do otherwise without acting contrary to the law of nature, and therefore his consent is superfluous, for the power to consent must imply that of dissenting." And the obligation of each man to perform the duties of the civil state and submit to civil government arises not from his consent, express or implied, but from natural law. It is a necessary consequence of the two primary laws and essential to the order of human society constructed upon them. This general doctrine is entirely compatible with the fact that in certain instances a man may bind himself by his free will to the observance of some particular laws or obedience to a given magistrate, or become voluntarily a member of a certain civil state. And it is the same when a number or a body of men enter into such political engagements. These are facts which have no effect on the general rules and principles of Public Law, though they belong to the municipal or internal Public Law of the particular state to which they relate.

Savigny treats the subject of the origin of states in a very philosophical manner. Speaking of the influence of the state on private law, he says, that if it be possible to conceive private law as an abstraction extraneous to the state, and founded on a community of ideas and manners, it is the establishment of the judicial power, which, within the state, gives to private law reality and life. But he adds, that we must not believe that there is in history a time anterior to the foundation of the state, and in which private law had an incomplete existence, that is to say, the state of nature. "For each people, as soon as it gives signs of life, is already constituted into a state or politic community. That natural condition of man, or state of nature, is a hypothesis created by the imagination, looking on the people abstractedly from the state."^a After some further reflections, Savigny thus proceeds to consider the opinions on the formation of the state.

"The preceding theory on the nature and origin of the state has not been generally admitted. Assemblies of men have often been supposed, undefined and independent of national unity. But this opinion

^a L. 3, 4, ff. De Reg. Jur.

^b Savigny, *Traité de Droit Rom.* tom. 1, p. 23, edit. Guenonx, Paris, 1840.

falls to the ground before the fact, that at all periods nations constitute states, and everywhere we find a *people* constituting the basis of the state. It has been attempted in the Slave States of America, for example, to unite great masses of men without regard to their origin. But these attempts have had bad consequences, and the constitution of the state has met with insurmountable obstacles. I therefore say in answer to those who support this opinion, that originally, and according to the nature of things, all states were formed in the nation or people, by the people and for the people."

"Others represent the creation of the state as an act of individual wills, as the effect of a contract; a system, the consequences of which are as pernicious as they are false. Thus it is supposed, that if the individuals have thought fit to form a state, they might equally not have formed it at all, or have incorporated themselves in another state, or adopted another constitution. Without repeating what I have said of the natural unity of nations, and its necessary consequences, I will only observe that in every case in which such a compact is possible, the state infallibly exists already both in fact and in law; and from that time the matter in question would be, not as to its composition, but as to its decomposition. This erroneous system rests on a double error. The numerous varieties presented by the constitution of states, that is to say the individual and historical elements, have been looked upon as so many arbitrary acts of the human will. Then the divers significations of the generic term *people* have been confounded together. Thus this term signifies—1st, that natural unity in which the state receives its birth, and is perpetuated from generation to generation; 2ndly, the union of persons existing contemporaneously, which the state comprises at a determined time; 3rdly, the assemblage of persons not invested with power, that is to say, the governed without the governors; 4thly, in republics (ancient Rome for example), the assembly of citizens in whom, by the constitution, the sovereign power resided. The confusion of all these ideas has led to the error of attributing to the body of the governed, both the abstract right of the people, considered as a natural unity, and the privilege of the Roman *populus*, and thus placing the sovereignty in the hands of the subjects. If, indeed, without the last step, the sovereignty is attributed to the body of all the contemporaneous individuals, both governors and governed, a more correct result is not obtained. In the first place the state is not composed of all the individuals taken per capita, but of certain orders or classes created by its constitution. For the total number of individuals do not exercise political will or acts. And as you must necessarily subtract the greater number—women and minors—you are reduced to the fiction of representation. And the assemblage of all

the contemporaneous individuals would still not constitute the *people*, for a *people* considered under this point of view continues in futurity, and has an imperishable existence."

"But the opinion which I combat has an element of truth. Accident and the arbitrary will of men exercise their influence over the formation of states: conquest has often changed natural frontiers, dismembered nations, and broken their unity. Often, also, the state assimilates to itself a foreign element. But that assimilation operates gradually, and according to certain natural laws. Such events, though frequent in history, are nevertheless anomalies. The people and its organic development still remain as the basis and the natural and regular origin of the state. If in the midst of that operation, external events bring to it a foreign element, a healthy and vigorous people is able to absorb that element by its moral energy. If not, the result of the struggle is a diseased condition of the body politic. This explains how that which was, in its origin, injustice and violence, may, submitted to that power of assimilation, become a legitimate element of the state. But to present these anomalies—these trials which moral power undergoes—as the true origin of states, to fall back on this adventurous opinion as a sole refuge from the dangerous doctrine of a social compact,—this must be absolutely rejected, for it is difficult to say whether the remedy be not worse than the evil."*

The doctrines of Domat and Savigny show clearly that the supposed original contract is an unnecessary legal fiction. For the real legal origin of states, considered philosophically, is the origin of the obligations by which they are constituted or formed. And those obligations are the different ties which unite men together in society; and their origin is derived from the two primary laws which direct the conduct of man towards his end. Thus Savigny says, that the state derives its birth from an internal force, a superior necessity which impresses upon it a character of individuality;† this necessity engenders the state, developing it out of the universal human society of which politic or civil society is a natural consequence. And whatever may be the political events which have caused the association of men in any given case under a particular government, the legal nature of the state is to be found in the ties and obligations which are consequences of the two primary laws, and part of the secondary Natural Law.

The doctrine of an original contract between the crown and people was asserted by the Convention Parliament in that famous resolution which declared the vacancy of the crown after the flight of King

* Savigny, *Traité de Droit Rom.* tom. 1, p. 27—31.

† *Ibi*, p. 20.

James the Second.³ That position was, indeed, as Hallam observes, rather too theoretical,⁴ and no record of any such contract is to be found in the history of England. It was no doubt resorted to for the purpose of denying the divine right of monarchy, from which the arbitrary and indefeasible right of the crown was plausibly derived. But such a fiction was obviously unnecessary. For the rights of the people as well as those of the crown clearly rest not on contract but on laws. And so we find it in Fortescue, whose learned annotator rejects the theories of Hobbes, Locke and Rousseau regarding the institution of government.⁵

In the case of federal constitutions, such as that of the United States of America, there is indeed a fundamental law, the origin of which partakes of the nature of that of a treaty or contract;⁶ but this is not an original contract in the sense in which the term is used by Locke and Rousseau, nor a compact. It is a constitution of government,—a modification of civil or political society previously existing, by the union of several bodies politic in a form of constitution.⁷ And such federal fundamental laws are what the civilians call anomalous laws, which have no effect upon the general doctrines or jurisprudence of Public Law.

CHAPTER XIX.

OF THE SOVEREIGN POWER IN CIVIL SOCIETY OR STATES.

The Civil Power—Principle of Subordination—Authority of a Majority—Perfect and imperfect Societies—Necessity of the governing Power in Civil Societies—Analysis of the Civil Power by Grotius—The Sovereign Power—Doctrine of the Sovereignty of the People.

CIVIL society may be described as a modification of natural society, whereby the sovereign power is created having authority to command,

³ Black. Com. b. 1, ch. 3, p. 211; Story, Comment. on the Constit. of the United States, vol. 2, book 3, ch. 3, § 341—344.

⁴ Hallam, Constit. Hist. vol. 3, ch. 14, p. 349.

⁵ Fortesc. De Laudibus Legum Angliæ, by Amos, ch. 14, and note. And see Story, ubi sup. § 349.

⁶ Story, ubi sup. § 350, &c. We shall return to this subject in Chap. XXVII.

⁷ Story, ibi, § 372.

and from the will of which depends, in the last resort, all that regards the temporal happiness and welfare of society.* And, as we have seen, the institution of civil society and political sovereignty is a natural result of the principles on which all human society is based. For the purpose and design of God in linking men together in the social state, to unite them by the spirit of the two primary laws, necessarily implies a subordination among them, or a subjection to authority whereby some are placed over others. That authority is called by Grotius the *civil power*, or the moral power of governing a state,² when it exists in civil society. That this principle of subordination to authority is matter of Natural Law is shown by the reflection of Domat, that it is necessary in all conjunctions of several persons together which exist among men. Thus, in marriage, the man is the head of the wife, and by birth children are subjected to the authority of their parents; and when the increase of mankind required another regimen, God established chiefs or princes over many families.³ And in conjunctions of persons having equal legal rights, as members of some body, the majority expresses the will of the body, to which the individual members must submit. Savigny, in considering the constitution of judicial persons or corporate bodies, examines this subject. He says that the rule of law making the will of the majority that of the body in its corporate capacity, is founded on Natural Law. For to require unanimity would be to impede the acts and the will of the body corporate; and the rule is preserved in the Roman Law, and adopted by the Canon Law.⁴ Unanimity is not impossible in a deliberating assembly, and it is required for the verdict of an English jury, but it is so difficult to obtain, and subject to so many contingencies, that it would be an obstacle to the movements and the life of the assembly. And the principle of the power of a majority once admitted, the right of being acknowledged as the will of the whole body is naturally attributed to a simple majority, that is to say, half the votes, *plus* one. And every other proportion, such for instance as two-thirds, or six-sevenths, has a character of arbitrary or positive law.⁵ We see here, again, an example of the way in which a rule of natural law arises from an

* Burlamaqui, *Droit des Gens*, vol. 4, p. 15, edit. Dupin.

² Grot. *Droit de la Gens*, liv. 1, ch. 3, § 6.

³ Domat, *Droit Publ.* Preface.

⁴ L. 160, § 1, ff. *De Reg. Jur.*; l. 19, ff. *ad Municipalem*, 30; *Decretal. Tit. De his que fiunt a majore parte Capituli*. And see Fæbeus, *De Reg. Jur. Canon.* p. 176, who explains the distinction between things affecting the rights of the individuals as such, and those which regard the corporate body. Commentary on rule 29 in Quinto *Decretal.* (*De Reg. Jur.*)

⁵ Savigny, *Traité du Droit Rom.* tom. 2, pp. 329, 330.

institution of arbitrary law. But these doctrines of Savigny are cited for the purpose of showing a natural principle of authority and government, even in aggregations of persons who are all equal. For in these bodies, the individuals composing them are subject to the authority of the majority; and that majority usually delegates powers more or less extensive to certain persons, who represent the aggregate for divers purposes of internal government and administration. Savigny examines the legal question arising between two propositions, one requiring unanimity, and the other holding a majority of a body sufficient. He looks upon them chiefly with reference to Private Law, which regards an aggregate body as *persona*, a person in contemplation of law. But he gives us the principle of Public Law, that the authority of the majority is the most simple and natural expression of the life and will of a body politic or assembly of men. The evils resulting from neglect of this principle are illustrated in the history of Poland, by the absurd institution of the *liberum veto*.^b An artificial constitution may create different modifications of that expression. And the learned writer argues that it is naturally limited as to power, because the corporate body in its nature includes the future, as well as the present, represented by all the members living at one time. But this investigation presents to us a natural element of government incident to aggregates of men, and which is to be found in one form or another throughout political systems, and even in associations belonging exclusively to Private Law. And this confirms the position that the subordination of persons, on which civil government is founded, is part of the order established by God for the government of the world, and that men may be united in the spirit of the two primary laws.

Suarez distinguishes two sorts of associations of men. One is imperfect, that is to say, the family: and the other is perfect, that is to say, political society, or the state. The former commences with the association of husband and wife, and this is completed by that of parent and child, to which aggregates are added the accessory relations of master and servant, for divers purposes. From these three conjunctions arises the first association of men, which is called imperfect with reference to the state or political civil society, because the family is not sufficient to itself for the wants of man and human society, though it is perfect as far as regards domestic economy. In the nature of things, politic or civil society is therefore necessary, as we have already shown, and this is according to the will of God—for Cicero truly says: *Nihil Principi Deo in rebus humanis esse gratius, quam homines habere inter se societatem ordinatam et perfectam, quæ civitas*

^b Wheaton, Hist. of the Law of Nations, p. 269.

dicitar. And a perfect community or *civitas* necessarily requires a power to govern it.^c

St. Thomas Aquinas proves this last proposition in a manner which points out very well the nature of the civil power of government. He argues it *a priori* by saying that no *body* can subsist without some principle, whose province it is to procure and compass the common good of such body. As it is in natural bodies, experience shows the same to be regarding politic bodies.^d The reason is clear, says Suarez, for each member looks to his own welfare or interest, which may sometimes be contrary to the common good. And many things are for the common good which do not affect individuals, or do not so affect them that they will forward those things, except so far as touches themselves. Therefore in a perfect community there must be necessarily a public power to which belongs the duty of promoting and procuring the common good. Hence, he concludes, the justice and necessity of a civil magistrate is to be inferred. For that institution is nothing more than a man, or several or many men, invested with that power of governing a perfect community. And it is clear that this power must exist in men; for mankind are not naturally politically governed by angels, nor immediately by God himself, who, according to his ordinary law, acts by means of sufficient secondary causes. Therefore, it follows that civil politics are governed by men.^e This disquisition may perhaps appear subtle and metaphysical, but it is useful to show the nature of human government, considered as such, and its connexion with Divine government, which ordinarily is carried on through the medium of secondary causes. And so we may remember that Domat, in drawing his general plan of human society, includes among the four foundations of the order of society in its present state, the government exercised by God over it. The great civilian says: "It is by God's universal providence over mankind, that He divides the earth among men, and distinguishes nations by the diversity of empires, kingdoms, republics and other states; that He regulates the bounds and duration of them by the events which give them their rise, their increase and their fall; and that in the midst of all these changes, He forms and maintains civil society in every state by the distinctions of persons to fill employments and other places, and by the other ways in which He regulates and governs everything."^f These reflections refute the error of those who have looked on human government as so different from Divine government, as to be opposed to it.

^c Suarez, De Legib. lib. 3, cap. 1, § 3.

^d Div. Thom. Aquin. Opusc. De Regim. Princip. lib. 1, cap. 1.

^e Suarez, ubi sup. § 5.

^f Domat, Loix Civiles, Traité des Loix, ch. 9, § 6.

We have seen that Grotius defines the civil power, as it is ordinarily called, to be the moral power of governing a state. He thus analyzes that power: "Whoever governs a state, governs it either himself, or by means of others. Where he governs in person, he regulates either general affairs, or particular affairs. He regulates general affairs by making laws or by abrogating them, both in what regards religious affairs (so far as he is entitled to interfere in them), and in secular or temporal matters. This is what Aristotle calls the master science of government."

"Particular affairs are either directly public, or else private though considered in relation to the public good. Those which are directly public concern either certain actions, as when peace is concluded or war made, treaties and alliances; or certain things, as when imposts or taxes are raised and the like. And to this relates the *eminent dominion* (*dominium eminens*) which the state has over the citizens and their property, so far as the public welfare requires. The way of regulating well all this is comprehended, according to Aristotle, under the general name of *politics*, and under another, which signifies the art of deliberation. Private affairs are here the differences among private persons, so far as the peace of society requires that they should be terminated by the public authority. This is what Aristotle calls the science of judging. We come now to what the governing authority does by means of others. Those things are done by means of magistrates and other ministers, such as ambassadors. In this consists the civil power. *The sovereign power is that the acts of which are independent of every other superior power, so that they cannot be annulled or set aside by any other human will.*^a I say, by any other human will; for the sovereign himself must be here excepted, who is free to change his will as well as whoever succeeds to all his rights, and who consequently has the same power.^b

"Now there are two subjects in which sovereignty resides, of which one is common and the other proper, in the same way that the common subject of sight is the human body, and the proper object is the eye."

"The common subject in which resides the sovereign power is the state, which we have defined to be a perfect body. And thus we exclude those peoples who have passed under the dominion of another people, such as those which the Romans reduced to the condition of provinces. For such peoples are not by themselves states according

^a Boehmerus, Jur. Crim. § 2, c. 5. And see Atkyns, Inquiry into the Power of dispensing with Penal Statutes, edit. 1689, p. 441.

^b So Parliament cannot bind future Parliaments. Co. 4 Instit. cap. 1, 42.

to the idea which we now attach to the term, but only members of a state, in the same way that slaves are members of a family."

"Sometimes, however, it happens that there is but one head of several peoples, who nevertheless each form a perfect body, for it is not the same in a moral as with a natural body. There cannot naturally be several bodies with one head; but one and the same moral person, considered in different respects, may be the head of several distinct societies or communities. And a certain proof that in the case supposed, each people is a perfect body of a state, is, that if the reigning family be extinguished, the sovereign power returns to each of the peoples before united under one head.

"It may also happen that several states may be united together by a very intimate alliance, and form a compound body, as Strabo expresses it in several places, without ceasing nevertheless to be each a perfect body. Aristotle has observed this in several passages, and others speak of it."

"The state therefore is, in the sense already mentioned, the common subject-matter of sovereignty. But the proper subject in which it resides is either one or several persons, according to the laws and usages of each nation; in a word, the *sovereign*."¹

Pufendorf draws the same distinction between the common and the proper subject of sovereignty; the former being the state itself, or the community; and the latter the person or persons in whom the sovereign power is vested by the organic laws of the state. And he shows that the different forms of government arise from the diversity of the proper subject in which the sovereign power resides.² Thus the sovereign is called monarch, senate, or people, according as the sovereign power is in the hands of one person, or in those of several.³

The preceding chapter has shown the primary origin of sovereignty. The civil power is an essential element, and indeed the very essence of the state, and therefore the origin of civil society is that of the civil power. And Grotius shows, as we have seen, that the sovereign power is the civil power with the quality of supremacy, so that its acts can be annulled by no other human will. This supremacy is necessary to constitute a state. For the state is a perfect body,⁴ which implies that it contains within itself that plenitude of the civil power of governing itself which renders it supreme. Therefore the creation of a state necessarily includes that of a sovereign power. We have yet to consider the proposition of Suarez and St. Thomas

¹ Grot. Droit de la Guerre, liv. 1, ch. 3, § 6, 7.

² Pufend. Droit des Gens, liv. 7, ch. 5, § 1.

³ *Ibid.* lib. 7, c. 2, § 20.

⁴ Grot. Droit de la Guerre, liv. 1, ch. 1, § 14.

Aquinas, and the common opinion of the civilians and canonists, that the civil power of government, which includes the sovereign power, is primarily vested in the community or commonwealth, and derived from thence by sovereign rulers.⁸ This doctrine is no doubt the origin of that known under the term of *the sovereignty of the people*.

To explain this subject, we must first examine in what sense it is legally true, that the civil power of government is primarily vested in, and is derived from, the body of the community or state.⁹ All that Suarez, Savigny and Domat have said about the origin of states, and the way in which civil society is formed, shows us that the civil power, or power of government, is an institution of secondary natural law, and one of the means whereby universal human society subsists; and that it is the creature of civil or politic society, of which it is a necessary concomitant. Thus it is impossible to conceive a politic or civil society without the civil power, constituting that *ordinata imperandi obediendique concordia*, of which St. Augustine speaks,¹⁰ and essential to the very idea of such a body; that is to say, a legal organic society, or, as Suarez expresses it, *societatem ordinatam*.¹¹ Without that it would be a mere multitude. And St. Augustine considers that peace arising from the legal authority and obedience of civil society, as a cause of whatever harmony exists between the terrestrial and the celestial city.¹² It follows that the civil power is an intrinsic quality of a civil or politic community. And temporal sovereignty is the supreme civil power. These reflections explain the distinction drawn by Grotius above, where he says, that the common subject or seat of the sovereign power is the state considered in its corporate capacity, though its proper subject is the person or persons invested with the supreme civil power. And so Savigny denies, as we have seen, the doctrine of the omnipotence of the contemporaneous members of a body politic represented by a majority, because the body in its abstract character extends beyond them, and includes the future.¹³ And he says, that the confusion of the different ideas included under the term people has led some to attribute to the aggregate of the governed or subjects, both the ideal right of the people considered as a natural unity, and the privileges of the *Populus Romanus*, and to place the sovereignty in the hands of the subjects.¹⁴

⁸ Suarez, De Legib. lib. 3, cap. 4, § 2; l. 1, ff. De Constit. Princip.

⁹ Suarez, De Legib. lib. 3, cap. 4, § 2.

¹⁰ Div. August. De Civ. Dei, lib. 19, cap. 14.

¹¹ Suarez, De Legib. lib. 3, cap. 1, § 3.

¹² Div. August. De Civ. Dei, lib. 19, cap. 17.

¹³ Savigny, Traité du Droit Rom. tom. 2, pp. 329, 330.

¹⁴ Ibi, tom. 1, ch. 2, p. 29.

By neglecting these important legal doctrines many politicians have fallen into errors as dangerous as that of the social compact, with which the sovereignty of the people, understood in a wrong sense, has a close and obvious connexion. They have held that the sovereign power is subject to forfeiture for any act done which they deem an infraction of the supposed contract between the sovereign and people, and that of such forfeitures the people are the only judge. The result is, that two sovereign powers must exist in every state, and the constitution of civil society be constantly liable to be dissolved by a suspension of the sovereign functions and a revolution. Therefore, by the law of England, the crown can do no wrong. And Blackstone observes, that wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it, the very notion of which destroys the idea of sovereignty. "If, therefore," he adds, "the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or on each other, or if the king had a right to animadvert on either of the two houses, that branch of the legislature so subject to animadversion would instantly cease to be part of the supreme power: the balance of the constitution would be overturned; and that branch or branches in which this jurisdiction resided would be completely sovereign. The supposition of law, therefore, is, that neither the king, nor either house of parliament, collectively taken, is capable of doing any wrong; since, in such cases, the law feels itself incapable of furnishing any adequate remedy. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule or express legal provision: but if ever they unfortunately happen, the prudence of the times must provide new remedies for new emergencies."^a In truth, a sovereign power above another sovereign power is a contradiction in terms. And this is a real meaning of the doctrine of the indivisibility of the sovereign power taught by the civilians, though in one sense that doctrine is an error, as Barbeyrac observes,^b because different portions of the sovereign power may be held by distinct persons or bodies, altogether forming the sovereign.

Grotius lays it down that the opinion must be rejected that sovereign power belongs always, and without exception, to the people, so that they have a right to punish and repress kings whenever their authority is

^a Black. Com. b. 1, ch. 7, p. 244.

^b Grotius, *Droit de la Guerre*, liv. 1, ch. 3, § 17, not. 3; Pufend. *Droit des Gens*, liv. 7, ch. 5, § 15, not.; Crasso, *Annotat. sopra Giannotti e Contarini*, annot. 38, pp. 485, 486; Zallinger, *Instit. Jur. Natur. et Eccles.* lib. 3. cap. 2, § 205.

misused. "Every wise and enlightened person," he adds, "must see what evils have been and may be caused by this opinion." He argues that a free people may legally submit itself to one or more persons, or to another state, so as to reserve no power to itself. And he gives many examples to show that the right of governing is not always submitted to the judgment and will of those who are governed. And this is especially the case where sovereign power over a people is acquired in lawful war. For civil dominion, as well as property, may be acquired by that means, according to the law of nations.⁷ Grotius then answers some arguments of those who maintain that sovereign power always resides in the people. They say, in the first place, that the person who originally established another in authority is above him. But that is so only with regard to power which continues to depend on the will of its author, and not to one which, though freely conferred, cannot be revoked. Thus, when a woman has married a man, she must continue to obey him from the moment that she has given him power over her. And so the Emperor Valentinian said to the soldiers, who, after making him emperor, demanded something which he disapproved—"It depended on yourselves, soldiers, to elect me or no; but now that you have elected me, what you ask depends on me and not on you." Besides, Grotius asserts that it is false that all kings are established by the people. The contrary appears from a multitude of examples. Another argument is drawn from the philosophers, who say that all power is established for the benefit of those who are governed, from whence it is argued that those who are governed are above those who govern, because the end is more considerable than the means. But this does not follow. For a guardian is appointed for the advantage of the ward, and yet the ward must obey the guardian as a superior.⁸ And so by the constitutional law of the United States no state can disobey or withdraw itself from the federal sovereign authority of the union.⁹ And there are, as Grotius says, instances where there is a mutual interest between the governor and the subject. So it is with colonies and other dependencies governed by the authority of the mother country.

Such are the general principles of Public Law; but questions arise between the sovereign and the people in different countries which must be decided by the particular laws and constitutions of those countries. And in many states the person invested with the sovereign dignity has only a part of its powers. And therefore Grotius observes

⁷ Grotius, *Droit de la Guerre*, liv. 1, ch. 3, § 8.

⁸ Grot. *ibid*; Pufend. *Droit des Gens*, liv. 7, ch. 6, § 5, 6.

⁹ Story, *Comment. on the Constit. of the United States*, vol. 1, § 359.

that in questions of this kind it is necessary to see where is the sovereign power, without reference to the form or title of the office.^b But this will be adverted to when we consider the modifications and divisions of the sovereign power.

CHAPTER XX.

OF THE PARTS OR BRANCHES OF THE SOVEREIGN POWER.

The Three Parts of the Civil Power—*Jura Majestatis*—*Merum et Mixtum Imperium* and *Merum Imperium*—Jurisdiction—The Legislative Power—Place and Effect of Legislation in the Formation of Municipal Law—Customary Law—Political and Legal Character of the Legislative Power—The Executive Power—Power of inflicting Punishments—Its Nature and Objects—Fundamental Principles of Criminal Law—Power of Pardoning—The Appointment of Magistrates and Officers, and their Uses and Functions—Right of War and Peace—Negotiations with Foreign States—Power of assembling and arming Forces—Revenue—*Jus Eminens* and *Dominium Eminens*—True Foundation of the Right of Taxation—The Interference of the State with Private Property for the Public Use—Equality of Taxation required.

WE have seen that Domat, in giving a plan of Public Law, points out that the design of God in connecting men together in society, in order to unite them by the spirit of the two primary laws, implied the necessity of a subordination among them, placing some above the others; and, that as the body of society is composed of an infinite number of different conditions and professions necessary for the common good, it is necessary to society that there be a general subordination of all the conditions and professions under one power, which shall maintain its order.^c This reflection shows the meaning of the doctrine held by Grotius and Pufendorf, that sovereignty is simple and indivisible.^d And, indeed, the unity of the State necessarily imports a unity in the sovereign power, whereby it is governed and kept together.

But notwithstanding the simple and indivisible nature of sovereignty, its functions are performed by distinct acts, according to the different means of preserving the State, and fulfilling its different purposes.

^b Grot. ubi sup. § 10.

^c Domat, Droit Publ. Preface.

^d Grot. Droit de la Guerre, liv. 1, ch. 3, § 17; Pufend. Droit des Gens, liv. 7, ch. 4, § 1; Burlamaqui, Droit des Gens, tom. 4, p. 130, edit. Dupin, 1820.

And in this sense Grotius describes it as an assemblage of different parts closely conjoined together, with the character of independence belonging thereto.* So the sovereign power, inasmuch as it prescribes general rules for the conduct of civil life, is called the legislative power; where it pronounces according to those rules upon the differences among the citizens, it is the judicial power; where it arms the citizens against foreign enemies, or orders them to cease hostility, it is the power of making war and peace; and when it chooses ministers or public servants, to assist it in the care of public affairs, it is the power of establishing magistrates, and the like.^f In all these things the civil government of the State consists. They are means whereby universal human society is made to subsist. And as they have in all their details a relation to the order of that society which is constructed on the two primary laws, so they constitute the system of civil government, regulated by a multitude of laws, which are consequences direct or remote of those two primary laws.

Grotius, as we have already seen, also divides the parts of the sovereign power with reference to its different modes of acting. He begins by laying it down that the supreme or sovereign power which rules the State, governs it either directly by itself, or by means of magistrates and other ministers. And then he proceeds to the subject matter of its acts. The supreme power regulates either general affairs or particular matters. It regulates general affairs by enacting and abrogating laws. The particular or individual matters are directly public or else private, but considered as having a relation to and affecting the public good. Under the head of those particular matters which are directly public, are included the declaration of war, and the conclusion of treaties of peace and alliance, and other matters of that nature. Those particular matters which are private, comprehend the affairs of individuals which are settled by the public power, so far as the peace and welfare of society require such interference. This analysis gives us the division of the civil power of government into three parts—the legislative power, which regulates general affairs, that is to say, establishes general rules called laws, which are to be followed in all cases to which such rules apply; the executive power, which administers particular matters directly public, such as the enforcement of obedience to the laws, the means by which they are enforced, the making of war and peace, the revenue, the creation and distribution of offices and employments for the public service, and the like; and the judicial power, which, by interpreting the laws, and applying them to particular cases, determines on the rights of persons, and thus

* Pufend. ubi sup.; Grot ubi sup.

^f Pufend. ibi.

settles their differences so far as the public good requires. And here we must observe, that both the executive and the judicial powers must be exercised according to the general rules established by the legislative power.*

These different powers are called by the civilians *jura majestatis*. *Majestas* is a legal term signifying the supreme or sovereign power of the State.^b It includes *merum et mixtum imperium*, though that term is used by Lord Chief Justice Hale as signifying a regal jurisdiction.^c For *merum et mixtum imperium* consists in jurisdiction, together with the power of commanding the enforcement of decrees or other acts of jurisdiction; whereas *merum imperium* is a mere power of using coercive means against wrongdoers, specifically given by the law; and jurisdiction implies both species of *imperium*, whereas there may be a mere authority of cognition, that is to say, of deciding a question on reference from a superior authority or dependant thereon.^d But this is sometimes called *jurisdictio simplex*.^e An explanation of these legal terms is required here, because they are frequently used by civilians and writers on Public Law. We will now examine the *jura majestatis*, or parts of the sovereign power.

The nature and object of civil society indicate the parts of the sovereign power, and the peculiar office of those parts. The State is a moral body, or body politic, which must have a common will binding on its individual members or citizens. Therefore, that will must be expressed in the form of general rules or laws.^f A politic body cannot be without a politic government, for its unity principally arises from subjection to one rule or regimen, and to a common superior authority. And, without this, the body could not be directed to one end and to the common welfare. Consequently it is repugnant to natural reason that there should be a community of men united as a politic body without some common power which the persons composing the body must obey;^g and this power of prescribing general rules is of Divine or natural law.^h It is called the legislative power, or the power of legislation.

* Grotius, *Droit de la G.* liv. 1, ch. 3, § 7; see my Comment. on the Constitutional Law of England. p. 60; Heineccii *Preflectiones in Pufendorf de Offic. Hom. et Civ.* lib. 2, cap. 7, § 1.

^b Matthæus, *De Criminibus*, ad lib. 48 Digest, tit. 1, § 1, 2; Voet ad Pand. lib. 48, tit. 4, § 2.

^c Hale, *Pleas of the Crown*, part 1, ch. 10, p. 66. And see Coke, 4 Inst. p. 357.

^d Cujacius, tom. 7, col. 76, 77, 78, edit. Venet. Mutin.; Donellii Comment. tom. 4, col. 1088, 1089, 1090, lib. 17, cap. 6, § 6, 7.

^e Reiffenstuel, *Jus Canon. Univers.* tom. 1, p. 319; lib. 1, tit. 29, § 3, num. 18.

^f Pufend. *Droit des Gens*, liv. 7, ch. 4, § 2.

^g Suarez, *De Legib.* lib. 3, cap. 2, § 4.

^h *Ibi*, cap. 3, §§ 2, 3, 4.

The place and effect of legislation in the formation of municipal law are not easy to determine. Though Gajus says that all nations are partly governed by law common to all men,^f and Ulpian describes civil or municipal law as that which is not identical with natural law, though not altogether departing therefrom,^g yet there is, as Suarez remarks, no civil law universally binding on mankind as such, that is to say, by the authority of a temporal legislature. So that, though the whole world is governed by civil or municipal laws, at least so far as regards nations not altogether barbarous, yet, according to the course of nature, there never was, and there is not any legislative temporal power for the whole world.^h And if each separate body of municipal laws be examined, it is difficult to see precisely the extent to which it was originally created by legislation.

Savigny examines this curious question. He says that the law of a people which develops itself in an invisible manner, the origin of which cannot be referred to an exterior fact or a determined time, has always been recognized. But the recognition of this sort of law has in some way remained sterile, because a too restricted object has been assigned to it, and its nature has not been correctly appreciated. The expression applied to it, of customary law, may give rise to false inductions. Thus it might be supposed that originally the solution of a point of law was left to chance and settled by examples, that is to say, by following the first arbitrary or casual precedent, and that so a rule was made and custom alone engendered the law. But the learned writer holds that very different principles and consequences will result from an examination of the true basis of positive unwritten law. For that basis has its reality and existence in the general conscience or opinion of the people, manifested by exterior acts, by usages and customs. And thus custom does not engender positive unwritten law, but is the outward sign or appearance whereby it is shown to exist. He however admits the creative power of custom regarding secondary principles not determined by the opinion of the people, and parts of positive law which require to be settled by any rule whatever it may be. There, he says, our anterior determinations become authorities, and thus custom is one of the elements of law. Here operates the law of continuity of opinions, of acts and circumstances, which exercises a great influence over divers matters of the law; and we should desire the domain of customary law to be narrowed, on account of the errors mingled with its origin and transmitted to us,

^f L. 9, ff. De Just. et Jur.

^g L. 6, ff. ibi.

^h Suarez, De Legib. lib. 3, cap. 4, § 7.

except in those cases where it is the result of judgment and deliberation.³ We come now to legislation.

Savigny commences by stating that positive law (using the word in the sense of the Latin term *jus*) may require to be clothed in distinct language and with an absolute declared authority, for the purpose of excluding doubts arising from individual opinions, and facilitating its enforcement or execution; and that this operation produces the law (*lex*), the making of which is the highest attribute of the supreme power of the State.⁴ The fifty decisions of Justinian may illustrate this position, so far as they embodied received legal opinions and positions. Legislation (continues Savigny) may have for its object both public and private law. The law made by the legislative power is the expression of the popular law—the wants, the opinions, and the spirit of the nation; and this is so whatever may be the form given to the legislative power by the political constitution of the State. For whether the law be made by a prince, by a senate, by an elected assembly, or by a concurrence of those divers powers, the relations between the legislator and the people are not essentially altered, and it is an error to suppose that to represent the spirit of the nation, the law must necessarily emanate from an elected assembly.⁵

This doctrine (he continues) does not assign to the legislator a secondary post below his dignity, nor condemn legislation as useless or even dangerous. For legislation completes positive law, and aids its progressive development. Whatever may be the certainty of the fundamental principles of positive law (in its primitive form), a multitude of details may remain undetermined, especially among a people whose activity has not specially been directed to the formation of law. Thus, for all the rules which leave a large space to discretion, the popular law constituted by opinion requires a complement; and though that complement may be given by custom, legislation offers it in a way more prompt and more secure.

Legislation, adds the illustrious German civilian, has a still greater effect on the progressive development of law. When the change of manners, of opinions, and of wants, requires a change in the law, or the progress of time calls for new institutions, these new elements may be furnished by the invisible force which created positive law. But here, above all, the intervention of legislation shows itself beneficent

³ Savigny, *Traité du Droit Rom.* tom. 1, chap. 2, § 12, pp. 32, 33, 34, 35. And see my *Reading on the Reasons of Laws—Readings at the Middle Temple*, pp. 125, 126.

⁴ Savigny, *ibid.*, § 13.

⁵ *Ibid.*, p. 38.

and even indispensable. As those divers causes act slowly and gradually, there is necessarily a time of transition during which the law (*jus*) is uncertain, and the law (*lex*, made by the legislative power) is called upon to put an end to that uncertainty. On the other hand, the different institutions of the law are connected together, and react on each other. Each new principle may therefore, unperceived, contradict other and undenied principles. To solve these difficulties, reflections and combinations are required, which cannot come from a personal action, that is to say, that of general opinion. These principles become still clearer when the law (*jus*) to be modified is determined by an enacted law. There the principle which forms law (*jus*) is tied down and fixed by the authority of a text, and its progress stopped. We see in the history of all nations times when circumstances prevent the law (*jus*) from issuing from the opinion and conscience of the nation; and there the legislator takes up a work of progress and development, which cannot be interrupted. Never did this change take place more suddenly or more visibly than under Constantine, and from his time the Roman law was continued only by the numerous laws of the emperors.* These reflections are confirmed by the history of English law. In the reign of Edward the First we find a remarkable progress made by a great number of statutes settling things and giving definite form to legal institutions which the common law had left in embryo; so that Blackstone says that the very scheme and model of the administration of common justice between party and party was entirely settled by this king.† And in modern times the statute law has progressively increased to an enormous extent, partly because the courts are fettered by former decisions, and many difficulties can only be solved by legislation. So the rise and progress of the equitable jurisdiction of the Court of Chancery give an example of law produced by the force of the wants and the opinions of the country. The courts of law, in the days of Lord Coke, opposed the jurisdiction of equity as an innovation; but the narrow way in which the judges had construed the Statute of Westminster‡ the Second, 13 Edw. I. c. 24, and the insufficiency of the remedies given by the courts of common law, rendered equity a necessary complement of the national jurisprudence, and so it became fully established. Afterwards this new branch of English law became the subject of a great number of statutes, made for the very purposes to which Savigny refers, *i. e.*

* Savigny, p. 41.

† Blackst. Com. book 4, ch. 33, p. 427.

‡ Blackst. Com. book 3, ch. 4, pp. 51, 54, 55. And see the opinion of Fairfax in the Year Book, 21 Edw. IV. 23.

to define, modify and settle the system and its administration, which the legislature had not created—to remove or solve difficulties, and to construct machinery.

Savigny observes, that the explanations which he has given show legislation to be by no means inferior to pure popular law, that is to say, law not clothed in the formula of a written law. But, he adds, that it would be also a great error to believe that the popular law is intended only to fill the accidental *lacunæ* of legislation, and that it must disappear as soon as laws are written; for the result of this would be, that a written law could not be abrogated by a contrary custom. Therefore, if these two forms of the law (*jus*) be placed on the same level, it does not appear why an accidental circumstance, the adoption of a principle by legislation, should fetter popular law and arrest its action. He then proceeds thus to speak of the form of the written law. This is determined by the very nature of the power from whence it emanates, and the absolute authority with which it is clothed. They require the abstract form of rule and command. Expositions and developments, in the nature of proofs or arguments, belong to another sphere of ideas. But to make a good law, the legislator must seize upon the entire organic nature of the institution, and, by an artificial proceeding, draw from it the abstract prescription of the law.^a

We must not suppose that customary law is altogether foreign to the authority of the legislator, for its force depends on his tacit consent, whatever may be the form of government.^b This is more obvious in a democracy, for, as Julian says, it is not materially different, whether the people give their consent by their votes or by their acts.^c But however despotic a government may be, the people may introduce law by use, by virtue of the acquiescence of the legislative power.^d And this is the way in which the *jus populi* of Savigny manifests itself as positive unwritten law.

These reflections will suffice to give some idea of the philosophical and legal characteristics of legislation.

We have now to consider, briefly, the political legal character of the legislative power. The power of making laws is essentially the supreme power in a state; and when it is vested in any separate branch of government, that branch must have a preponderance in the political system, and act with such great force on the community, that the line of separation between it and the other branches of the govern-

^a Savigny, *Traité du Droit Rom.* tom. 1, p. 42.

^b Voet ad Pand. lib. 1, tit. 3, § 27.

^c L. 3, ff. De Legib.

^d Grot. *Droit de la Guerre*, liv. 2, ch. 10, § 5.

ment ought to be distinctly marked.* It cannot be controlled or limited, except where, as in the congress of the United States of America, it is specially defined, and delegated with a reservation of sovereignty in some other authority.^f In that case, there is a residuary legislative sovereignty reserved to the states; so that the congress has not an entire and plenary legislative power. But where that power is entire, it cannot be restricted or limited in its exercise by any organic law. Therefore, it is a maxim in the constitutional law of England, that no act of parliament can derogate from the power of future parliaments.^g Such is the meaning of the doctrine called the omnipotence of parliament. This is the result of a fundamental principle of Public Law, the supremacy of the legislative power. Therefore it is that Montesquieu says, that when the legislative and the executive powers are conjoined in the same person or senate there is no liberty, because that person or senate may make tyrannical laws to enforce or execute them tyrannically.^h And herein the legislative differs from the other powers of the state, which must act according to such laws as apply to them, and cannot alter the law. These principles show why the Roman emperor was *legibus solutus*, or not bound by the law;ⁱ and yet Constantine declares that the emperor ought to consider himself bound by the laws,^k that is to say, except in his legislative capacity. And Cujacius explains that the emperor was bound by his laws in the same way that the Roman people were bound by theirs, when they held the sovereign authority.^l

We will now proceed from the general to the particular matters, regulated or administered by the supreme power of the state. And first, of those which are directly public. These belong to the executive power.

In its strictest sense, the term executive power would include only the execution and compelling obedience to the law. And this is the first branch of the executive power. It has also a wider signification. Montesquieu holds that there are in every state three sorts of powers, namely, the legislative power, the power executory of things depending on the law of nations, and the power executory of those which depend on the civil or municipal law.^m The third of these he calls

* Kent, Comment. vol. 1, part 2, lect. 11, p. 220; Story, Comment. on the Constitution of the United States, vol. 2, § 532.

^f *Ibi*.

^g Coke, 4th Inst. cap. 1, p. 42.

^h Montesq. *Esprit des Loix*, liv. 11, ch. 6, p. 208; Blackst. Com. b. 1, p. 146.

ⁱ L. 31, ff. De Legib.; Voet ad Pand. lib. 1, tit. 4, § 1.

^k L. 4, Cod. De Legib. et Constit.

^l Cujac. Op. tom. 3, fol. 417, edit. Venet. Mutin.

^m Montesq. *Esprit des Loix*, liv. 11, ch. 6, p. 207.

the power of judging, or judicial power, and the second the executive power. But this classification is evidently not comprehensive enough to include all the necessary functions of government. And the system of Blackstone seems, on the whole, preferable, which comprises under the general term executive, all that does not belong to the legislative nor to the judicial functions,⁸ because the two latter consist in decreeing and deciding, whereas the remaining functions consist either in executing what has been so decreed or determined, or in doing or administering divers things for the public welfare of the state. It is true that the executive has in all states the power by itself, or its officers, to make regulations in the nature of bye-laws. But this sort of power is of an exceptional or anomalous character, and is either derived by delegation from the legislature, or exercised chiefly with a view to the performance of executive functions, especially matters of administration. So, for instance, the treasury in this country has the entire control and management of the public revenue and expenditure; and that department exercises a quasi legislative power of making regulations by treasury minutes.⁹ But that power does not alter the nature of the proper functions to which it is simply subsidiary.

The executive power has divers parts, the nature of which we will now examine separately, so far as the subject comes within the scope of Public Law.

One means of enforcing laws is the infliction of punishments. And this is in accordance with a chief object of civil society, namely,¹⁰ protection from injuries and the maintenance of peace and security. And though this object cannot be perfectly attained, yet the institutions of civil society are calculated to produce the observance of natural laws and those which have been provided by the civil power. But the selfishness and passions of man would overthrow the order of society and disobey the laws, if the authority of the government did not restrain them by inflicting punishments on those who disturb that order, by breaking the law.¹¹ I have already shown¹² that the right of punishing offences is of natural law; and that in the civil state and under municipal laws, it is exercised by the authority of the civil magistrate; and though the form in which the right of punishing exists in civil society is given by municipal law, yet the right itself is *juris gentium* and of natural law.

⁸ Blackst. Comment. b. 1, ch. 2, pp. 146, 147.

⁹ Thomas, Notes of Materials for the History of Public Departments, pp. 1, 9, 12.

¹⁰ Pufend. Droit des Gens, liv. 7, ch. 4, § 3.

¹¹ Pufend. ibi; Heineccii Prælectiones in Pufendorf; De Offic. Hom. et Civ. lib. 2, cap. 7, § 3.

¹² See beginning of Chap. XVII.

In relation to private law the province of the legal power of punishment is the protection of private rights where they are not sufficiently protected by the civil remedies, whereby the rights of dominion or property and the obligations arising either from consent or without consent, are protected and enforced. Thus, for example, the right of dominion or ownership would not be sufficiently protected by the civil remedy of restitution in cases of theft.*

But in relation to Public Law, the province of the legal power of punishing is more extensive. We have seen that Domat defines Public Law to be a system of rules which regard the general order of a state. And he shows that the power of restraining by punishments persons who violate those rules, and disturb that order, is necessary to the existence of human society. The exigencies of human society in highly civilized countries have engendered an infinite variety of those rules, and caused the detail of that order to become very complicated and extensive. Hence that great number of penalties or punishments which we find in the laws of our own and other countries, having for their object to enforce obedience to their enactments. And viewed in this light, criminal law may be considered as a branch of Public Law. Its fundamental principle is contained in the words of Cujacius with regard to municipal law, strictly so called, that is to say, positive or arbitrary municipal law : *Utilitas peperit jus civile. Hac autem utilitas æquitas est, et quidquid reipub. utile et conducibile est, bonum et æquum est.* And so Grotius lays it down that the true object of human punishment is not vengeance but some utility, some advantage to be derived from its infliction.¹ It is not only because the offender morally deserves punishment that he is punished, but he is punished with a view to utility, to produce some useful result. And so, as Grotius and Pufendorf agree, every punishment ought to have for its object the correction of the offender, the security of those interested in the offence not being again committed, or the welfare of the community or mankind at large.²

The chief and essential object of punishments is to deter others, by example, from offending.³ This is the only object of capital punishments. Another great object of punishments is the amendment of the offender. It is the infliction of some pain, with a view to deter the

* See my Readings at the Middle Temple, p. 139.

¹ Cujac. Recit. Solemn. ad lib. 1 Digest. tit. De Just. et Jur.; Cujac. Op. tom. 7, col. 9, edit. Venet. Mutin.; Grot. Droit de la Guerre, liv. 2, c. 15, § 4; Cremani, De Jur. Crim. lib. 1, pars 2, ch. 4, vol. 1, p. 124.

² Pufend. Devoir de l'Homme et du Cit. liv. 2, ch. 13, § 6, 7; Grot. ubi sup. § 8, p. 128; Devoti, Inst. Canon. lib. 4, tit. 1, § 1.

³ Cremani, De Jur. Crim. ubi sup. § 8.

offender from breaking the law again ; and it should be accompanied with what Lord Coke calls preventing justice, which consists partly in religious and moral instruction.¹ Of the corrective character all punishments ought to partake, except that of death, which operates only by way of example. Such are the general objects of punishments. But the degree of moral guilt of the offence must not be neglected in determining the severity with which it should be punished.² And utility being the object of punishments, severity ought never to be carried beyond what that object demands. Therefore it is necessary that there should be vested in the sovereign power of the state an authority to pardon offences or mitigate punishments, in cases in which peculiar circumstances require an exception to the general rules of criminal law, or where clemency is more for the public good than a strict adherence to the law.³

The legislative power and that of enforcing the laws would suffice, with the judicial power, to secure men from wrongful acts of others, but other things are also necessary for the order and welfare of a state and to attain the objects of civil society.

As public affairs, in times both of peace and of war, could not be managed or administered by the sovereign or the sovereign power itself, without the assistance of ministers, officers, and magistrates, it is necessary that there should be in every state a power of establishing persons to hear and determine the differences of the citizens, to levy and manage the revenue and finances, to discipline and command forces, and perform various other duties in the public administration and economy.⁴ This is one of the powers generally included in the executive branch. And whatever be the mode in which public officers and magistrates are appointed or elected, their authority is part of the civil power of government, and emanates from the sovereign power of the state. And thus Blackstone says, that the most universal public relation by which men are connected together is that of government ; namely, as governors and governed, or, in other words, as magistrates and people. And of magistrates some are supreme, in whom the sovereign power of the state resides ; others are subordinate, deriving their authority from the supreme magistrate, and acting in a subordinate sphere.⁵ The functions and duties of those public officers are of various descriptions : some judicial, others executive ; some ministerial and

¹ Coke, 3rd Inst. Epilogue.

² Grot. ubi sup. § 28.

³ Lampredi, Diritto Publ. Univers. tom. 3, p. 71.

⁴ Pufend. Droit des Gens, liv. 7, ch. 4, § 6 ; Heineccii Prælectiones in Pufend. De Offic. Hom. et Civ. lib. 2, cap. 7, § 6.

⁵ Blackst. Com. b. 1, ch. 2, p. 146.

others discretionary, and others again consisting in advising and deliberating : and their various offices and gradations, and the way in which they perform different parts of the public service, their rights, their obligations, and responsibilities, constitute the greater part of the internal Public Law of every state. These matters are governed by an infinite variety of rules, some of natural or immutable, and others of positive law ; but all bearing some relation to the order of society and to the two primary laws on which that order is constructed. For the body of society is composed of an infinite number of different conditions and professions and employments necessary for the common good. And it is essential to society that there should not only be a subordination of them all under one power, but also a systematic subordination among themselves according as their functions depend upon each other, for the purpose of uniting the whole body politic together by the spirit of the two primary laws. And thus we have seen that the power of civil government is one of the bonds or ties by which universal human society is made to subsist. We have also seen that another tie by which God maintains human society is that of the common humanity uniting men together, though belonging to different states. It has for its subject the use of commerce and of the several sorts of intercourse and communications which one nation holds with another, and the subjects of one state with those of another. And hence arises the necessity of negotiations, embassies, and treaties among nations. And as there is no common power having authority over nations to maintain the observance of those laws which ought to govern them in their intercourse with each other, and punish offences against them, wars have become necessary, with a variety of things arising from that mode of settling the differences of nations. Treaties, negotiations, wars, the conclusion of peace, and the various matters arising therefrom, are therefore a necessary branch of the sovereign power.⁴ It naturally belongs to the executive. Though the right of declaring war is vested by the constitution of the United States of America in the legislature,⁵ that of carrying it on belongs to the President.⁶ And, for the most part, this prerogative is given by the Public Law of different countries to the executive. And though treaties have a force and effect analogous to laws, yet they are not laws, but contracts. With regard to negotiations, it is important to observe that in a state where the legislative authority is vested in one or more assemblies, they must be confided to the executive branch of the government,

⁴ Pufend. *Droit des Gens*, liv. 8, ch. 6, § 10; Vattel, *Droit des Gens*, liv. 3, ch. 1, § 4; liv. 4, ch. 2, § 10.

⁵ Kent, *Comment.* vol. 1, part 1, lect. 3, p. 52.

⁶ *Ibi*, part 2, lect. 13, p. 282.

which usually possesses the necessary requisites of unity, secrecy and despatch. And for this reason ministers in this country frequently decline to communicate information to Parliament regarding negotiations which are not concluded.

The internal peace of the community would not suffice without protection against external injuries and attacks. For this purpose the citizens must unite their forces for their common security and the maintenance of their common rights. And thus there must be in the State a power of assembling and arming forces on land, and, in some cases, on the sea also.² Such forces are also required in time of peace, for the maintenance of the public tranquillity, and the protection of commerce; and external security can hardly be enjoyed by any nation that is not prepared for the event of war. This can only be accomplished by keeping some permanent military establishment, the care of which is an important department of executive government.

Public administration and government, both in war and peace, require considerable resources and expenditure. Therefore the sovereign authority must have power to make the subjects contribute to the expenses necessary for the State.³ The State has rights over the citizens who compose it, and their property, so far as the public welfare necessarily requires. This right is the chief part of what is commonly called *jus eminens*, or superior right. It is that right which the entire body has over the members and whatever belongs to them, and which being for the common good is superior to the private rights of individuals belonging to their private interest.⁴ This *jus eminens* is called by writers on Public Law *dominium eminens*, when it regards property.⁵ It is the right of the State or the sovereign power over property within it when necessity or the public good requires.⁶ This is the true foundation of the right of taxation. That right has indeed been placed by some writers on the ground of consent of individuals to part with a portion of their property for the public good. But this theory is an instance of the error which attributes to consent or contract, obligations which arise from natural equity. The doctrine that every man consents (in some forms of polity) to be taxed by his representatives, rests on a fiction, for every system of representation leaves many, frequently the majority, unrepresented, who never-

² Pufend. Droit des Gens, liv. 7, ch. 4, § 5.

³ Pufend. Devoir de l'Homme et du Citoyen, liv. 2, ch. 7, § 7.

⁴ Grot. Droit de la Guerre, liv. 1, ch. 1, § 6.

⁵ Zallinger, Inst. Jur. Nat. et Publ. Eccl. tom. 1, lib. 3, cap. 4, § 214; Lampredi, Diritto Publ. Univers. tom. 3, parte 2, esp. 3, § 21; Grot. Droit de la G. liv. 1, ch. 3, § 6.

⁶ Vattel, Droit des Gens, liv. 1, ch. 20, § 241.

theless pay taxes.^m And here a celebrated rule of the canon law is applicable — *quod omnes tangit ab omnibus debet approbari*.ⁿ The meaning of the rule is, that though the corporate acts of a body, such as a chapter, are valid with the consent of the majority, the consent of all is necessary for the purpose of affecting the private individual rights of the members of the body.^o So the consent of a majority would not *per se* suffice on sound principles of jurisprudence to affect the private individual rights of property of the minority of the citizens, without an obligation making it the duty of the minority to submit to the decision of such majority. But if an obligation to contribute to the burthens of the State be shown, then it will follow that the powers of imposing taxes and other duties lawfully belongs to that person or those persons in whom it is vested by the fundamental or organic laws of the State. That obligation is similar to the other obligations of secondary natural law, resulting, as consequences, from the institution of civil society; and so it is held by the highest authorities on Public Law.^a For all the members of a body ought to perform their duties in it, that the body may subsist in the good order in which it ought to be for the common welfare; therefore it is both necessary and just that those who compose a state should consider it their duty to do what is required of them for this common good, which is their own good. This truth, which comprehends all duties to the public, particularly regards the duty of those who compose a state, to contribute towards the expenses which the public service requires, whether for its internal order and administration, or for defending it against external enemies — since, without this assistance, the state would perish by injustice, violence, divisions, and sedition, and would be left an easy prey to its enemies.^a

The same principles prove that it is sometimes just that a person be deprived of his property for the public advantage, as is the case when railroads, canals and other public works are constructed on private property. But in that case the person whose rights are affected has a right to compensation; for the charges of the public service ought to be distributed equally and in a just proportion, and no one (as far as may be) should be burthened beyond his just share. This principle is analogous to the case of goods thrown out to lighten a vessel: for the owner of the property is entitled to compensation from the others who

^m Savigny speaks of "the fiction of representation" in this sense. *Traité du Droit Rom.* vol. 1, p. 30.

ⁿ Reg. 29, tit. De Reg. Juris. in Quinto Decretalium.

^o Fœbeus, De Regul. Jur. Canon. p. 175, &c.

^a Zallinger, *Instit. Jur. Nat. et Eccles. Publ.* tom. 1, lib. 3, cap. 7.

^a Domat, *Droit Publ.* liv. 1, tit. 5.

have derived advantage, by the safety of their goods, from his loss.⁷ Compensation to persons whose property is taken or injured for public advantage should be given either by the State or by the persons promoting or more immediately benefited by the works.

Such are the chief principles of Public Law regarding a public revenue. They are in accordance with the doctrine of Adam Smith, that "the subjects of every state ought to contribute to the support of the government, as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they enjoy respectively under the protection of the State. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."⁸ And so another high authority says:—"For what reason ought equality to be the rule in matters of taxation? For the reason that it ought to be so in all the affairs of government, as a government ought to make no distinction of persons or classes in the strength of their claims on it: whatever sacrifices it requires from them should be made to bear as nearly as possible with the same pressure on all, which, it must be observed, is the mode by which least sacrifice is occasioned on the whole. If any one bears less than his fair share of the burthen, some other person must suffer more than his share, and the alleviation to the one is not, *cæteris paribus*, so great a good to him, as the increased pressure on the other is an evil. Equality of taxation, therefore, as a maxim of politics, means equality of sacrifice. It means apportioning the contribution of each person towards the expenses of the government, so that he shall feel neither more nor less inconvenience from his share of the payment than every other person experiences from his. This standard, like other standards of perfection, cannot be completely realized; but the first object in every practical discussion should be to know what perfection is."⁹ It is curious to find something analogous to those principles in the laws of Manou.¹⁰

The charges of the public service are partly defrayed in most countries by public property vested in the sovereign power of the state, for the benefit of the community. And the administration of

⁷ Grot. *Droit de la G.* liv. 3, ch. 20, § 7; Pufend. *Droit des Gens*, liv. 8, ch. 5, § 7; Vattel, *Droit des Gens*, liv. 1, ch. 20, § 244; Pandect. lib. 14, tit. 2, De Lege Rhodia; *Blakmore v. Glamorganshire Canal Company*, 1 Mylne & K. 162; 1 Blackst. Com. 139; 1 Stephen, Com. 133, 134, 154; *Simpson v. Lord Howden*, 1 Keen, 598, 599; *Lister v. Loblely*, 7 Ad. & El. 124; *Entick v. Carrington*, 19 Howell, State Trials, 1066.

⁸ Adam Smith, *Wealth of Nations*, b. 5, ch. 2, part 2. And see Pufend. *Droit des Gens*, liv. 8, ch. 5, § 6.

⁹ Mill, *Polit. Econ.* vol. 2, b. 5, ch. 2, § 2, p. 350.

¹⁰ *Loix de Manou*, liv. 7, § 128, 129; and see Pufend. *Droit des Gens*, l. 8, ch. 5, § 5.

such property is for the most part entrusted to the executive power, though subject to legislative regulations.² Such, in this country, are the crown lands or demesne lauds which form part of the ordinary revenue of the crown.³ This species of property must be distinguished from the private patrimony of the prince, which belongs to him otherwise than by the title of his quality as sovereign.⁴

There is some doubt whether the raising of revenue naturally belongs to the legislative or to the executive branch of government.

Grotius, Pufendorf and Burlamaqui, agree in placing it under a separate head.⁵ But a distinction will easily solve the difficulty. The establishment of a permanent tax must naturally be by the enactment of a law by the legislative power, for this is a general regulation prescribed by the sovereign power of the state. But it does not follow that because in countries where there is a representative assembly, the consent of that assembly is required for the imposition of taxation; therefore, that act of sovereignty is necessarily legislative. Thus, where supplies are raised in the form of a contribution, to be paid once, it is not necessarily an act of legislation, though it may be so in point of form, according to the municipal law of the country. And the actual levying and management of revenue is essentially an executive function, especially where it consists of carrying the law into execution, by receiving and administering a permanent tax. The doctrine that raising a revenue belongs to the legislative power is more political than legal, and it is grounded on unanswerable reasons of policy, whenever the form of government is mixed. We may conclude that the power of taxing the community for the public wants is of an anomalous nature, though frequently exercised by the enactment of laws; but the actual levying of imposts and their management properly belongs, on legal principles, to the executive.

With regard to interference with the rights of property by the State for the public advantage, as in the case of roads, canals and railways, and other public works, it would seem that where this involves a permanent alienation of private property secured by the municipal law, without the consent of the owner, it ought to emanate from the authority of the legislative power; but the actual administration of this function is executive.

² Vattel, *Droit des Gens*, liv. 1, ch. 20, § 244.

³ Blackst. Com. b. 1, ch. 8, pp. 245, 246.

⁴ L. 2. Cod. De Offic. com. rer. priv.; l. ult. Cod. De Agricol. et Maneip. Domin.; l. 6, ff. De Jure Fisci; Domat, *Droit Publ.* liv. 1, tit. 6, § 8.

⁵ See my Comment. on the Constit. Law of England, p. 61; Grot. *Droit de la Guerre*, liv. 1, ch. 3, § 6, num. 4; Pufend. *Droit des Gens*, liv. 8, ch. 5, § 4; Burlamaqui, *Droit des Gens*, vol. 4, part 2, ch. 13, § 6, p. 415, edit. Dupin; Martens, *Droit des Gens*, liv. 3, ch. 3, § 88.

CHAPTER XXI.

OF THE JUDICIAL POWER.

Legal Nature and Necessity of the Judicial Power—Private War—Cases in which the Use of Force by Private Individuals is still lawful in Civil Society—Right of Self-defence—Jurisdiction—*Notio*—Proper or ordinary and delegated Jurisdiction—Civil and Criminal Jurisdiction—Distinction between Public and Private Wrongs—Effect of Judicial Decisions—*Res judicata*—Degrees of Jurisdiction and Appeals.

WE have seen that Grotius, in dividing the sovereign power, refers to the judicial branch as the function of the sovereignty which regulates particular private matters, considered as having a relation to the public good. It may, perhaps, here be objected, that the judicial power, which decides doubtful questions regarding the application of laws, frequently pronounces on public as well as on private matters. This is true; but the judicial power never decides a naked proposition. It decides differences which arise in the case of individuals acting in their public or private capacity, or bodies acting as persons in law. Thus, in the trial of a minister of state, or other public functionary, for a state offence, the direct question which the court has to decide, is the guilt or innocence of the accused, though that decision has a relation to and may affect the constitution and welfare of the state. In this respect, Grotius speaks of things under the judicial power, as particular matters, directly or immediately private.

The judicial power is one of the three great branches of the civil power of government, and necessary for the maintenance of civil society. Its legal nature must now be examined as a fundamental part of Public Law.

The legislator constructs the law by discovering the organic nature of the institution or matter which he has to regulate, and drawing from it an abstract rule. But the judge, by an inverse operation, recomposes that which has been decomposed, and of which the law presents a single aspect.^b

Laws cannot by the utmost skill of a human legislator be so constructed as to exclude all doubts as to their application; therefore, disputes must arise touching their application to particular cases, and

^b Savigny, *Traité du Droit Rom.* tom. I, ch. 2, § 13, p. 42; l. 3, ff. De Legib. l. 8, ibi.

it is frequently necessary to examine into a multitude of circumstances, where actions are alleged to be at variance with the law.^c And before the effect of the law in a particular case can be determined, it is necessary to ascertain the facts. But questions of fact are, as Neratius says, liable to greater doubts and difficulties than questions of law.^d Now these questions of law and fact must be settled when they arise, otherwise the law would be altogether disobeyed in all such cases, and would take effect only where both its meaning and its application were undisputed. And thus the laws on which the whole system and the order of civil society depend, would be rendered of no effect, for laws would cease to be general rules of conduct. Especially criminal laws would be useless, since offenders would scarcely ever admit their own guilt. Mere natural society presents no sufficient solution of these difficulties, for as it has no sovereign power, every man must be left to vindicate his own rights and those of the persons in whom he is interested or whom he is bound to protect. This method has been called private war, concerning which Grotius says, that the law of sociability, which is in the nature of man, does not forbid all use of force, but only violence contrary to society, that is to say, that which is contrary to the rights of others. For a chief object of society is that each person may enjoy peaceably all that belongs to him, with the assistance of the power of the whole body.^e Therefore the law of society cannot justly prevent a man from defending and enforcing his own rights, unless society will undertake that task for him. But on the other hand, the right of private war, which makes every man judge in his own cause, and gives an undue advantage to the strong over the weak, is liable to the most serious evils.^f Civil society furnishes the remedy, and indeed it is by its very nature and objects incompatible with the existence of a system leaving each man to determine and enforce his own rights. For as Domat says, the different engagements or obligations by which man is destined to society on the foundation of the two primary laws, require the use of a government to restrain every one within the order of those which bind him. And for this God has established the authority of the powers which are necessary to maintain society.^g It is, moreover, contrary to natural reason that any man should be judge in his own cause.^h

^c Pufend. *Droit des Gens*, liv. 7, ch. 4, § 4.

^d L. 2, ff. *De Jur. et Fact. ignor.*

^e Grotius, *Droit de la Guerre*, liv. 1, ch. 2, § 1, num. 6.

^f Zallinger, *Inst. Jur. Nat. et Eccles. Pub.* tom. 1, lib. 3, cap. 9, § 140.

^g Domat, *Loix Civiles, Traité des Loix*, ch. 4, § 6.

^h Cod. lib. 3, tit. 5, *Ne quis in sua causa*; Hob. *Rep.* 87; Voet ad *Pand.* lib. 2, tit. 2, § 50.

From these reasons springs the fundamental doctrine of Public Law laid down by Antoninus Pius, Callistratus, and Paulus, that no man is permitted to take the law into his own hands, and to do himself that which the civil magistrate is instituted to do, when the civil power is able and ready to maintain his rights.¹ It follows that under the civil state, the civil power of government must administer justice, by deciding in each disputed case, whether the facts are within the meaning of the law and what the law commands thereon, and for this purpose deciding, where there is dispute or doubt, what are the true facts which are to be subjected to the rules of the law. And for this purpose, judges and magistrates of divers sorts and orders are instituted in every civil community. For as the law of nature does not give any man authority to judge over his fellows, the creation of judges belongs, as we have seen, to the sovereign power, which cannot itself perform those functions in person, though it sometimes reserves a supreme judicature by way of appeal.²

Thus the institution of civil society has taken away the right of private war from individuals. But this proposition must not be received without limitations. For those cases must be excepted in which, as Grotius says, the recourse to civil justice is not open to the citizen,³ and the right of self-defence therefore remains. Every man has a right to defend himself or his property, or even to defend others, where there is not time or opportunity to call the aid of the civil power. The reason is obvious; for if it were not so, men would find themselves in a worse condition in those cases, under civil government, than they would be in if they were living in mere natural society without any civil government. Therefore, Paulus specifies that it is not allowed for private persons to do for themselves that which the magistrate is able to do for them by his authority, otherwise great disorders would ensue.⁴

These reflections show that the judicial power is of secondary natural law, like the other parts of the civil power of government, necessary for the maintenance of society and the fulfilment of the two primary laws whereon society is constructed. And indeed it may be questioned whether some sort of judicature be not more necessary to the maintenance of civil society than municipal laws themselves.

The exercise of the judicial power is called jurisdiction. That term in its wider acceptation means every species of authority over persons or over things with reference to persons which is not a mere right of

¹ L. 13, ff. Quod metus causa; l. 176, ff. De Reg. Jur.

² Devoti, Inst. Jur. Canon. lib. 3, tit. 1, § 1, 3.

³ Grot. Droit de la Guerre, liv. 1, ch. 3, § 3.

⁴ L. 176, ff. De Regul. Jur.

property.^a But in the stricter sense, jurisdiction is the public power of deciding causes, civil and criminal;^b or the cognizance and decision of disputes which arise among men; the examination of accusations, and the punishment of the guilty according to law.^c Jurisdiction is exercised by the interpretation of the law, that is to say, by the declaration of the judge that the particular fact in dispute before his tribunal is or is not comprised in the law;^d or by the decision of the judge as to the truth of alleged facts, and his declaration that the state of facts so found to be true is or is not within the meaning of some particular law or principle of law. Thus Marcian speaks of the decisions of the Prætor as the living voice of the civil law; and Cicero says, that the magistrate is a speaking law, and the law a silent magistrate.^e

We have already seen the distinction between *merum imperium* and jurisdiction,^f which includes the power of executing or ordering the execution of that which is decided.^g There is also the simple power of deciding, which is called by the civilians *notio*, as contradistinguished from jurisdiction. It consists of the mere power of cognition and deciding, so that the execution of what is decided remains for another authority having jurisdiction.^h Such was the authority of masters in chancery. Jurisdiction may be either proper or delegated. The former is that which the judge exercises by virtue of his own office, and not by the authority of any other person; and the latter is a jurisdiction held and exercised in the name and instead of some other person who granted it.ⁱ This distinction is especially in use among the canonists, who designate proper jurisdiction by the name of ordinary jurisdiction, and divide all judges into ordinary judges and delegates, or judges delegate.^j There are other legal distinctions regarding jurisdiction, but these are for the most part either peculiar to the civil and canon law, or have their use and application chiefly with reference to private law. We will, therefore, confine ourselves to those which belong to Public Law. The most remarkable is that which divides jurisdiction into two branches, civil and criminal. They are thus defined.

^a Pufend. Droit des Gens, liv. 4, ch. 4, § 14.

^b Voet ad Pand. l. 2, tit. 1, De Jurisdic. § 1.

^c Pufend. Droit des Gens, liv. 7, ch. 4, § 4. And see Coke, 4th Inst. præm.

^d Lampredi, Jur. Pub. Univ. par. 2, c. 3, § 17.

^e L. 8, ff. De Just. et Jur.; Cicero, De Legib. lib. 3, § 1.

^f Chap. XX.

^g Voet ad Pand. lib. 2, tit. 1, § 1.

^h Ibi, § 2; l. 15, ff. De re judic.

ⁱ Voet, ibi, § 7.

^j Devoti, Inst. Canon. tom. 2, p. 33, lib. 2, tit. 2, § 1; Decretal. lib. 1, tit. 29; ibi, tit. 31.

Criminal jurisdiction is the public power of taking cognizance of crimes, and imposing punishments for the public welfare;^a or, as it is defined by Pufendorf, the power of examining accusations, and commanding the punishment of the guilty, according to law.

Civil jurisdiction is that which has for its object the application of laws not intended for the punishment of offenders, but declaring, defining or creating natural or civil, immutable or positive rights.

Some writers have sought the principle which distinguishes these two branches of jurisdiction from each other in the difference between private and public wrongs, and have held that the former are redressed by the civil, and the latter are vindicated by the criminal jurisdiction. But this does not solve the difficulty. Some unlawful acts, that is to say, acts or omissions at variance with the law, tend directly to injure the commonwealth, while others are immediately injurious to the rights of individuals or bodies considered as such.^b But no general invariable rule determines, on an abstract principle, the boundary between public and private wrongs. Every violation of a private right of an individual is a disturbance of the order of society, and an offence against the community, which is established for the protection of men's rights and the welfare of all its members. Viewed under this aspect, it is a public wrong. We have seen that man is destined to society, founded on the two primary laws, by two classes of engagements, which include all the legal relations that exist among men, whether springing from the natural ties of marriage, or from the infinite variety of engagements formed by the several communications which pass among men of their labour and industry, and all kinds of services and assistances, and those that relate to the use of things. And this comprehends all that may link persons together according to the different wants of life, by gratuitous communications or by commerce. And by all these engagements of both kinds God forms the order of society of mankind, to link them together in the exercise of the second law.^c The breach of any of the obligations, and the violation of any of the rights constituting that complicated network of innumerable and various engagements which pervade human society, is a disturbance of its order, and a wrong against the commonwealth. There are, indeed, offences directly affecting the community alone; and others, which, by reason of their pernicious nature, are injuries inflicted on society, as well as directly hurtful to some of its members. But these are particular sorts of cases which do not afford a general

^a Boehmerus, *Jur. Crim.* § 1, cap. 3, § 60; Carmignani, *Elem. Jur. Crim.* vol. 1, pp. 212, 113; Renazzi, *Jurispr. Crim.* lib. 3, c. 2, § 2, n. 2.

^b Vinnius ad *Instit. Perstit.* ad tit. 1, lib. 4.

^c Domat, *Loix Civiles, Traité des Loix*, chap. 2.

rule. And it may often occur that what is treated by the law as a private wrong, is not less injurious to the community than another offence, which is, nevertheless, placed under the head of public wrongs. Thus, for instance, it cannot be said that a petty theft is more pernicious to society than the wrongful and fraudulent detaining of an estate, or the refusal to pay a just debt; or that a trifling assault is more prejudicial to the community than the seduction of the daughter or wife of a citizen. Yet, by the law of England, the former is an indictable offence, and the latter only the subject of a civil action. Blackstone^c defines private wrongs or civil injuries as an infringement or privation of the civil rights of individuals, considered merely as individuals. But theft comes within that description, and yet it is treated as a public wrong. Blackstone seems to have felt this objection, for in exemplifying the distinction between public and private wrongs, he enumerates as public wrongs a number of instances all consisting of an offence either against the State as a body, or directly against the public peace, or including a violation of the rights of the community. The learned commentator perceived the true reason of the distinction which we are examining, for he says, "the law has a double view, namely, not only to redress the party injured, but also to secure to the public the benefit of society by preventing or punishing every breach of those laws which the sovereign power has established for the tranquillity and government of the whole." He gives here a description of the general objects of government. We may deduce therefrom that when the wrong is sufficiently redressed, and the wrong-doer sufficiently discouraged by the reparation which he is forced to make to the injured person, the wrong may be treated as a private wrong, and left to the civil remedy. But where the nature of the wrong is such that any reparation must be impossible or inadequate, and where the enforcement of the obligation to make reparation is ineffectual for deterring the wrong-doer and others, society is bound, for the protection of its members, to threaten and execute punishment in such cases, as well as in those wherein the grave nature, or the object of the crime, render it public as being an evident injury to the community in its corporate or politic capacity. We must conclude that, except in cases of the latter description, the distinction between civil and criminal law and jurisdiction is matter of public policy, and may vary according to the circumstances of times and places. For instance, an illegal refusal to pay a debt legally due is a private wrong, and sufficiently repaired by civil remedies. But if there were an illegal and unjust general refusal to pay any important class of debts all over a country, the

^c Blackst. Com. b. 4, c. 1, § 1.

number of private wrongs might become so serious in its effect that the civil remedy might be insufficient, and then the legislature might properly add a public prosecution and penalty to the insufficient power of the civil laws, though each of the refractory debtors might be actuated by no design against the commonwealth. And on the same principle it is held in the law of England, that the generality of an illegal act may alter the nature of the offence, so that, for instance, to levy a force or multitude of men to pull down a particular enclosure is a riot, but the same thing done to pull down all enclosures is levying war against the king and high treason.^d The question for the legislator to consider is, how a sufficient remedy can be provided to enforce the law, and secure the order of society. Thus, theft would evidently be very inadequately discouraged by the mere civil remedy of restitution. Therefore, thieves must be punished by the criminal laws, though theft is a private wrong, considered in itself. These doctrines are confirmed by the reflection that, though offences against Municipal Law are also for the most part violations of Natural Law also, yet the definitions of offences, where the Natural Law does not clearly define them, and the appointment of punishments, belong to arbitrary mutable law, which has its justice in its relation to the order of society, and the particular advantage found in enacting it, according as the times and places and other circumstances may require.^e And every body of Criminal Law contains both sorts of arbitrary laws, those which are consequences of natural laws, and those which regulate invented artificial matters.

We have now to consider the effect of decisions of the judicial power, on legal rights and obligations, with reference to Public Law. The nature of judicial functions implies necessarily that every suit or prosecution should have a solution, and that solution should be executed even against the will of the unsuccessful party.^f It follows, that whether the judgment be right or wrong, it declares and defines the rights of the parties conclusively, if it be final. Hence the maxim of the civil law—*Res judicata pro veritate accipitur*. It is founded on the principle of Paulus—*Singulis controversiis singulas actiones, unumque judicati finem sufficere probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem; maxime si diversa pronunciarentur*.^g This principle of public policy leads to a further consequence, namely, that not only a final judgment is conclusive in that suit between the parties, but it is

^d Hale, Pleas of the Crown, vol. 1, pp. 133, 134; Foster, Crown L. 215; Keiling, 70.

^e Domat, Loix Civiles, Traité des Loix, ch. 11, § 20.

^f Savigny, Traité de Droit Rom. tom. 6, p. 264, ch. 4, § 280.

^g L. 6, ff. De except. rei judic.

conclusive between them in every other suit. It may, as Savigny observes, seem natural, that when the justice of a decision comes in question in a new judicial proceeding, it ought to be examined over again, because if there be error, equity demands that it be rectified. But, on the other hand, the evils pointed out by Paulus would arise from this conclusion, which would produce a perpetual uncertainty of legal rights. We have to choose between two dangers. The question is, which of the two involves less injury to society. This is a question of Public Law.^b Long experience, and the law of different nations, show that the uncertainty of law has been looked upon as the greater evil and as an intolerable one, and to prevent it recourse has been had to an institution of positive law. The danger of unjust or erroneous judgments arising therefrom has been diminished by the establishment of degrees of jurisdiction and appeals.

The important positive institution intended to accomplish the end above mentioned may be generally defined as the authority of *res judicata*, that is to say, a fiction of truth which protects final judgments from being impeached or modified.^c This fiction or absolute presumption of truth gives to a matter of judicial procedure a powerful effect on legal rights themselves; for it may engender a right which did not previously exist, or destroy or restrict an existing right, or modify that which it contains. But the real practical value of this institution, as well as its object and spirit, are to maintain just and correct judgments. For legal rights are often uncertain and doubtful, and the means of proof vary at different times with regard to the same facts. Therefore, the second judge may decide erroneously a case rightly decided by the first; and a final decision is better for the parties than perpetual uncertainty.^d

We find here a remarkable instance of the way in which institutions of positive law contribute to the machinery and government of civil society, and also the peculiar equity belonging to them, which consists in their relation to and use in the order of society. In this peculiar equity their spirit is to be found and their relation to the two primary laws on which society is constructed.

We come now to degrees of jurisdiction and appeals. This institution seems at first sight inconsistent with what has been said regarding the importance of settling every litigation by a final decision. But it is not so; for this institution only makes the suit pass through different degrees or stages, to arrive at a final solution. Its advantages to prevent erroneous judgments are thus shown by Savigny. In the

^b Savigny, *ubi sup.* p. 265.

^c *Ibi*, p. 266.

^d *Ibi*, pp. 268, 269.

first place, the revision of a decision is a powerful means both for the parties and the judge to study and thoroughly master the questions in dispute. It is a still greater advantage to submit the final decision to a greater number of judges selected with much care. The new examination may however take place before the same court.¹ These considerations are doubly important in criminal cases, especially where the punishment is very severe. For, as Carpezovius says, the salutary remedy of appeal is more especially to be allowed where the question in dispute involves, not a mere civil and perhaps trifling right, but the life of a man and an irreparable evil.² Therefore, the civil law gives the prisoner (except in certain cases wherein the public safety will not admit any delay in the punishment of a notorious offender) a general right of appeal, and allows any bystander to appeal for him even against his will.³ Such is the spirit of the institution of appeals, of which, however, Ulpian says—*nonnunquam bene latas sententias in pejus reformat.*⁴ And thus we see the importance and difficulty of so framing and regulating institutions according to their spirit, as to attain, as far as the imperfection of human means will allow, the end which that spirit points out.

CHAPTER XXII.

THE CONNEXION OF THE JURA MAJESTATIS WITH EACH OTHER.

Difficulties arising from the Union of equal Powers by a Convention only—Union by means of Civil Government—Historical Illustrations—Chief Defect of several Federal Constitutions—The United States of America—Pufendorf's Argument regarding the Division of the *Jura Majestatis* or Parts of the Sovereign Power—Necessity of Unity in the Sovereign Power—Historical Illustrations—The same Proposition demonstrated—Principles on which the Sovereign Power may be divided—Constitutional Balance of Power—Insufficiency of Laws alone to preserve it.

PUFENDORF examines somewhat fully the connexion between the branches or parts of the civil power of government; and though the conclusion to which he arrives is not unanswerable, his arguments

¹ Savigny, *ibi*, § 284, pp. 294, 295.

² Carpezov. *Praet. Rer. Crim.* pars 3, quest. 139, num. 7.

³ Mathæus, *De Criminibus*, p. 744; l. 6, ff. *De Appell.*; l. 29, *Cod. eod. tit.*; l. 2, § ult. ff. *Quando appellandum est*.

⁴ L. 1, ff. *De appell.*

deserve consideration, because they illustrate many important things in Public Law, showing certain difficulties which arise whenever those parts are separated and vested in different persons or bodies.

There is, says the learned jurist, such an indissoluble connexion between the parts of sovereignty, that if it be supposed that they are in the hands of different persons, so that each may exercise his functions independently of the others, the result is an irregular state. For there are two principal ties which may unite the will of several persons or assemblies, namely, conventions or agreements, and government. Those who are united by agreements only, without subjection to a common government, are bound to the performance of their engagements by natural law; but in other respects they remain equal, as all men are by nature. If either of the parties break natural law by violating his agreement, there remains no remedy in case of his obstinate refusal to do what justice requires, except the use of force, that is, the right of war. Thus concord can exist among those who are united simply by convention between equals—only so long as each party executes what he has engaged; and a breach of the contract leads to terminate the alliance and causes war. Hence it appears that conventions alone are not by themselves a sufficiently strong bond to keep several persons long united in a body politic, especially as it is sometimes the more powerful of the parties who violates the compact; and even if the compact provide that whenever any one of the parties violates his engagements, the others shall unite against him, that clause would be useless when several of them simultaneously break the treaty. It would be necessary that the parties should at least constitute a sort of common government; otherwise another convention would be requisite, regulating in what way those should be dealt with who refuse to lend their assistance against the violators of the alliance, and another convention to support the former, and so on *ad infinitum*. But civil government forms a far more powerful union: for those who are subjects of the same sovereign authority do not remain the equals of the person or body in whom that authority is vested. For the sovereign has the power of commanding, and punishing those who disobey. Thus the citizens are placed under a greater necessity of conforming to his orders than if they were united by a simple convention, leaving to each a perfect equality, and full power to act according to his will.^p

These reflections of Pufendorf are illustrated by the constitution of the United States of America, under the articles of Confederation of 1777. For though by that constitution all the federal authority of

^p Pufend. Droit des Gens, liv. 7, ch. 4, § 9.

the nation was vested in the federal council or congress, the articles of confederation carried the decrees of that assembly to the states in their sovereign or collective capacity. Thus disobedience to the laws of the union must have been submitted to by the government, or those laws enforced by war.⁹ Kent furnishes another example from the history of Switzerland. By one of the laws of the Helvetic alliance, the cantons were bound to submit any difference that might arise between them to arbitrators. In the year 1440, a dispute arose between Zurich on the one side, and the cantons of Schweitz and Glaris on the other, respecting some territorial claims. Zurich refused to submit to a decision against her, and the contending parties resorted to arms. All Switzerland was of course armed against Zurich, the refractory member. She sought protection from her ancient enemy, the House of Austria, and the controversy was not terminated in favour of the federal decree until after six years of furious and destructive war.⁷ The great defect of all former federal governments, such as the Amphyctionic, the Achæan and Lycian confederacies, in ancient Greece; and the Germanic, the Helvetic, the Hanseatic, and the Dutch republics, in modern history, is, that they were sovereignties over sovereigns, and legislations, not for private individuals, but for communities in their political capacity. The only coercion for disobedience was physical force, instead of the decree and the pacific power of the civil magistrate. The inevitable consequence, in every case in which a member of such a confederacy chooses to be disobedient, is either a civil war or the annihilation of national authority.⁸ This defect in the political system of the United States of America was, in a great degree, remedied by the General Convention of 1787, which agreed to the plan of government now forming the constitution of that country. That constitution leaves, indeed, the residuary sovereignty of the States, but it grants specifically, and by necessary implication, powers to the union sufficient for a government, whose authority extends over every person within the entire federation. And thus the power of a civil government was made effectual to unite all the members of the body politic together.

Pufendorf goes on to argue, that it is easy to see that there is so great a connexion between the parts of sovereignty that no one of them can be separated from the others without producing an irregular government, wherein the union of the parts of the government

⁹ Kent, *Comment.* vol. 1, part 2, sect. 10, pp. 213, 214; Story, *Comment.* on the Constitution of the United States, vol. 1, §§ 248, 251; The *Federalist*, No. 15.

⁷ *Ibi.*

⁸ *Ibi.*, p. 217.

is formed by a convention, the effect of which is unsafe. Let us suppose, for example, that one person or assembly has originally and independently the legislative power, while another holds, in the same manner, the coactive or executive power. In that case, either the former must be useless and ineffectual, or the other must be its ministerial servant. For of what use would it be to make laws without the power of enforcing or executing them? And if the executive be invested with the power of taking cognizance of, and deciding whether the decrees of the legislature are to be executed, the legislative power vanishes. Pufendorf concludes that they must both depend on the same will. So he argues that the power of making peace and war cannot be separated from that of establishing taxes and other imposts. For how could the citizens be bound to take up arms for the defence of the country, or to contribute from their property towards the necessary expenses of the state, in peace and war, unless those who refuse to contribute can be lawfully compelled? It would also, he says, be absurd to give the power of making treaties and alliances regarding peace and war, to any person who has not also the direction of the affairs of peace and war.

To explain more fully the necessary connexion of the parts of sovereignty or *jura majestatis*, Pufendorf thus examines the different ways in which they may be conceived to be separate. Let us suppose the power of making peace and war to be vested in a prince, the legislative and judicial power in the hands of a senate, and the power of establishing taxes in those of an assembly of the people. If the king order the citizens to place themselves under arms, and they refuse to obey, either he has the power of compelling them to obedience himself, or he must have them judged by the senate. In the former case, it seems that not having the judicial power, he could not have that of ordering the punishment of the refractory citizens who refuse to be enrolled. But if the king must bring them before the senate, that body will decide whether the king had sufficient cause to levy troops, and whether the war ought to be undertaken, and so his power would be reduced to nothing. For we have supposed the senate to have an independent sovereign authority, not emanating from the prince, and therefore it would not be restricted to merely enforcing his commands. The same sort of result arises from comparing the right of the king with that of the people. For the power of making war is nugatory without that of raising supplies. And the assembly of the people will grant none, unless they are satisfied that the war is right and politic. Our author concludes that, if the parts of sovereignty be separated, an irregular body will be produced, the members of which will not be

united by a common government, but by conventions or contracts with each other.¹

These reflections show the difficulty of separating the *jura majestatis*, and the reason why so many mixt or constitutional governments have produced unsatisfactory results, or been of brief duration. This has arisen from a want of unity in the spirit and action of the separate parts of the sovereign power of the state, in consequence of which they do not tend to one common object, but encroach upon each until they fall into mutual hostility. And then, as there is no power to settle the contest, and so restore the equilibrium of the state, either one branch of the government usurps the power of the others, or else an external force, that of the people, or a successful usurper, effects a revolution. The revolution may either overthrow the whole form of government, as was the case with that which destroyed the English monarchy under Charles I.; or it may decide and terminate the contest between the powers of the state, as occurred on the dethronement of James II., when the Parliament obtained a decided advantage over the Crown. The last French Revolution is another example. There the contest was between the executive and the legislature. The assembly of the people was the sovereign. The president was not the officer of the assembly, but the chief magistrate of the people, by whom he was elected directly. The legislative and executive branches of the government were thus separate and co-ordinate. An irreconcilable difference arose between them; and the result was a state of war, in which the president, having the army and a great part of the people, who longed for a strong government, on his side, obtained the victory, and the Republic was soon overthrown.² These events were in accordance with the doctrines of Public Law explained by Pufendorf; and they show that wherever the parts of the sovereignty of the state are separated, there ought to be some principle of unity directing them to the common object pointed out by the spirit of the particular form of polity, and by the requirements of man and the end of civil society. For, as Grotius says, sovereignty is something simple and indivisible in itself, or an assemblage of divers parts closely bound together.³ And this explains the following passage of St. Thomas Aquinas:—*Bonum et salus consociata multitudinis est ut ejus unitas conservetur quæ dicitur pax, quæ remota, socialis vitæ perit utilitas, quinimmo multitudo dissentiens sibi ipsi sit onerosa Quanto igitur re-*

¹ Pufend. Droit des Gens, liv. 7, ch. 4, § 9, 11, 12.

² As Pomponius says,—*Etenim ut necesse esset Reipublice per unum Consuli. L. 2, § 11, ff. De Orig. Jur.*

³ Grot. Droit de la Guerre, liv. 1, ch. 3, § 17.

*gimen efficacius fuerit ad unitatem pacis servandam, tanto erit utilis.*⁷ Now this unity of peace cannot be preserved without a unity in the sovereign power. For we have seen, in examining the plan of society founded on the two primary laws, that the end of all government is that of society itself, and civil government is more perfect in proportion as it is adapted to the attainment of that end.⁸ The sovereign power is the great and essential feature of civil society. That power is, as Grotius says, composed of divers potential parts.⁹ But they differ only in the mode of their operation, having one and the same ultimate end or object,¹⁰ which is that of civil or politic society itself. The end of civil society is attained, or sought to be attained, in different ways, by means of different forms of civil polity, each of which has its peculiar spirit and laws. And all the parts of the sovereign power in each state, that is to say, the different operations of that power, must be directed according to that spirit, to the end of the civil society which it governs. This principle constitutes the unity of the sovereign power and the necessary and indissoluble connexion of its parts. The effect of that unity is to preserve one sovereign will in the state, which is essential to the maintenance and duration of a civil polity.¹¹

Some writers have used this principle of unity to argue that the entire sovereign power should be vested in one person or body of persons. But the reflections made above show that this is not a necessary conclusion. No doubt the unity of power is most perfect when its parts are thus concentrated;¹² and cases may occur in which that condensation of authority may be necessary to preserve the state. The Roman Dictatorship, created *ne quid respublica detrimenti capiat*, is an example of this. And so when in the year 1776, the progress of the British arms excited the most alarming apprehensions for the safety of the American Republic, the Congress transferred to Washington, for the term of six months, complete dictatorial power over the liberty and property of the citizens of the United States.¹³ This instance strikingly illustrates the principle of Public Law under consideration, which affords the key to the strongest arguments of those who maintain despotic governments to be best. But there is nothing in Public Law to forbid that the parts of the sovereign power be separated and distributed

⁷ Div. Thom. Aquin. De Regim. Princip. lib. 1, cap. 2.

⁸ *Ibi*, cap. 14. Non est ergo ultimus finis multitudinis congregatæ vivere secundum virtutem, sed per virtuosam vitam pervenire ad fructum divinam Tanto autem est regimen sublimius, quanto ad finem ulteriorem ordinatur.

⁹ Grot. Droit de la Guerre, liv. 1, ch. 3, § 17.

¹⁰ Barbeyrac, note 1, Pufend. Droit des Gens, liv. 7, ch. 4, § 1.

¹¹ Heineccius, Prælect. ad Pufend. de Offic. Hom. et Civ. lib. 2, cap. 7, § 8.

¹² Div. Thom. Aquin. De Regim. Princip. lib. 1, cap. 2.

¹³ Kent, Comment. vol. 1, part 2, lect. 10, p. 212.

among different persons and assemblies, provided there be such a distribution and combination of authority as to preserve the unity of sovereignty, so that the different powers may act, each according to its nature, with one general will and intent, so as to produce the same result as regards unity as if they were all vested in the same person or body.^f Thus if in the British Constitution the crown had no part of the legislative power, it would be entirely at the mercy of the two houses of parliament.^g The crown having the whole executive, and the two houses of parliament the whole legislative power, the sovereign power would be severed and its unity destroyed. So if supplies could be raised by the crown alone, the public revenues might be used against the authority of parliament. And if, on the other hand, the resources of the state were at the disposal of the two houses of parliament without the concurrence of the crown, those assemblies could raise forces and pay officers and magistrates depending entirely on their resolutions, and so the executive branch of the sovereign power would be reduced to insignificance, and the balance of the Constitution destroyed. Therefore, not only all supplies are granted by parliament to the crown, but the House of Commons votes no money except on the application or with the assent of the crown.^h And the House will not even receive any petition praying for a grant of money, unless it be recommended by the crown.ⁱ

These examples show how the common will of the branches of government is preserved, and the unity of the sovereign power thereby secured. In a well-constructed constitution they mutually check each other, leaving to each its proper attributions, and the freedom necessary for the due performance of its particular functions. And so a balance of political power is obtained, and the liberties of the citizens preserved from the arbitrary and unrestrained exercise of civil authority. It must, however, be admitted, notwithstanding the theories of constitutional lawyers and statesmen, that the unity of the sovereign power can be absolutely secured only when it is not distributed, but vested in one person or body of persons. For no laws can prevent contests between separated branches of the sovereign power, which, if pushed to extremities, destroy that unity, and so cause convulsions, and sometimes the overthrow of the constitution. The reason of this we have already seen. And in every state, such as our own country, in which a powerful popular assembly is invested with the chief control over the national resources, the permanency of its political institutions must

^f *Barlamsqui, Droit des Gens*, vol. 4, par. 2, chap. 1, § 6.

^g *Blackst. Com.* b. 1, pp. 154, 155.

^h *Hats. Preced.* vol. 3, pp. 194, 195, 196.

ⁱ *Ibi*, p. 242.

depend in a very great measure on the good sense and moderation of the body of citizens entrusted with the political franchise. No laws can provide for the want of these qualities in the people, because no laws can restrain the will of a branch of the legislature, and give a remedy against its want of wisdom, without destroying its independence; and a legislative assembly, supported by the body of the nation, and having the principal part in raising and managing the public revenue, must ultimately prevail in a struggle with the other branches of the sovereign power. This is one reason why new constitutions, apparently calculated to be durable, have nevertheless been overturned, either by a popular revolution, or an appeal to military force on the part of the executive. But, on the other hand, where the legislative assembly or assemblies have not the confidence and support of the nation, or where the military force is sufficient to overawe the people, and the executive can rely on the army, even against the law, a struggle will have a different termination, and probably end in despotism. Therefore, though the British constitution gives to the crown the command of the army, that force is *ipso facto* disbanded at the expiration of every year, unless continued by parliament, which also has the sole power of raising the necessary supplies for their maintenance. So great is the danger of a state of war arising between the branches of the sovereign power. And even these legal precautions would not suffice in times of internal discord, under a popular, able, and ambitious prince, with a victorious army, if the great body of the nation were not determined to support the law and constitution of the kingdom.

CHAPTER XXIII.

THE FORMS OF CIVIL GOVERNMENTS.—REGULAR STATES OR GOVERNMENTS.—REGULAR REPUBLICS.

The Constitution of a State—Equality of Sovereign States—The Place of Political Constitutions in the Scheme of Universal Human Society—Character of Organic Laws of States—General Classification of Forms of Government—Regular or Simple States or Governments—Democracy—Aristocracy—Monarchy—Oligarchy—Causes of peculiar Municipal Institutions—The Republican Form of Polity—Nature of a Republic—Mixed Governments—True Definition of a Republic—The Representation of the People examined—By what Constituency the Representatives should be chosen—Universal Suffrage considered—Constituent Assemblies and Conventions—Authority of a Majority—Secret Voting or Vote by Ballot—Indirect Election.

We have seen that Grotius, though he denies that sovereignty always belongs to the people, holds that the *common* subject of sovereignty is the State, and the *proper* subject is one or more persons according to the laws and customs of the country. Such person or persons is or are *the sovereign*.¹ Thus the sovereign power may be vested in one person, or in a small number of persons, or in the general body of the citizens. From these diversities arise the different forms of government which we are now to consider.¹ The constitution of a state is the law determining the way in which the public authority is to be exercised. That constitution shows the form under which the nation acts as a body politic, how and by whom the people are governed, and the rights and duties of those who govern. The constitution is the establishment of the order according to which the nation proceeds in common to obtain the advantages for which civil or politic society is established;² and those laws which determine the form of the government, and the manner in which the public power is exercised, are sometimes called organic or fundamental laws.³

There is this common to all states or civil societies, that the general order is maintained by a superior or sovereign power, whether it reside in one or in many persons. And this is an immutable rule of Public Law, because it is essential to the maintenance of society founded on the two primary laws, and to the order which God has

¹ Grot. Droit de la Guerre, liv. 1, ch. 3, § 7.

¹ Pufend. Droit des Gens, liv. 7, ch. 5, § 1.

² Vattel, Droit des Gens, liv. 1, ch. 3, § 27.

³ *Ibi*, § 29.

established in the world. But there is no immutable law pointing out in whom that sovereign power should be vested, and by what machinery it is to be exercised, or, in other words, the form of civil governments. That problem is solved in different ways; and history presents an infinite variety of examples of constitutions or forms of government engendered by the force of events and the circumstances of times, places and persons. All these forms have certain characteristics which distinguish them from each other; and an analysis of such characteristics has enabled writers on Public Law to reduce them to a few principal classes, each of which, however, comprises constitutions differing according to the laws and usages of the countries to which they belong, and more or less adapted to the wants and interests of those countries. These diversities of form do not affect the essential characteristics of sovereign states as such. Thus every nation, every sovereign state, is a member of the great society of mankind, and independent of all civil authority on earth. The sovereign represents the nation and its majesty, and is bound to maintain its interests and dignity. All sovereign states are therefore legally equal, whatever may be their form of government, their power or their weakness.* These important principles of Public Law belong to the very institution of separate civil societies, and are therefore of † secondary natural law. Another preliminary observation is here necessary. We have seen that God makes the society of mankind throughout the universe to subsist by three several kinds of ties, which distinguish it into three parts or three orders, according to so many different modes of the Divine conduct towards man. The first is that of Religion; the second of common humanity; and the third is formed in every state by the order which unites all the families composing it under one government. The first extends over the whole universe, if not in fact, at least in spirit; for though the Catholic Religion is not known in all places, yet it is essential to the spirit of the Christian Church to embrace all nations. The second sort of ties made by the natural rules of humanity and equity, ought naturally to have its extent all over the world, and prevails everywhere in some degree; but in many places it is violated in divers ways according to the force of interest or passion. These ties are the foundation of the law of nations: for this second order or part of society has for its subject the use of commerce, and the several communications and intercourse of nations with each other and the subjects of one state with those of another; and divers matters, such as the use of the seas, regarding the general interests and wants of mankind. The third tie, which is made

* Vattel, *Droit des Gens*, Prelimin. § 18; *ibid.* liv. 2, ch. 3, § 35—38.

† L. 5, ff. De Just. et Jur.

in every state by the union of the persons who compose it under the same government, is confined within each state. Thus there are as many ties of this sort as there are states, which are distinguished by different governments. The diversity of forms of government, of which we are going to treat, is a matter regarding only the third sort of ties, and the third order or part of human society which those ties constitute. Thus we see the place which political constitutions or forms of civil government hold in the scheme of universal human society. They are consequences of the division of mankind into states or nations, which we have shown to be an institution of Public Law arising from necessity—*jus quod necessitas constituit*.⁹ They belong, moreover, to one part of municipal law, that is to say, public, as contradistinguished from private municipal law. For though the influence of political institutions shows itself in the private law of countries, especially the arbitrary part, or else the same causes which produce certain political institutions also engender private laws governed by the same spirit; yet it is necessary to distinguish matters of laws having relation to the form of the government and the general order of the state, from the private law, both immutable and arbitrary. These reflections show the character of the organic laws forming the political constitution of states. They for the most part belong to the second class of arbitrary laws, that which regulates artificial arbitrary matters. For natural law does not determine the specific form of civil societies and civil government. But though these matters have been invented by men, and it may seem that they ought to be regulated wholly by arbitrary laws, yet they have many immutable laws relating to them. The reason of this is to be found in the causes which render civil government necessary, and in its uses. These are, to maintain the public order in the whole extent of the parts whereof it consists, to keep the subjects in peace, and to punish the attempts of those who disturb the peace and tranquillity of society; to procure the administration of justice; and to take care of all that is requisite for the common good of the state. And those rules which are necessary for the purposes of civil society are direct consequences of the two primary laws, and immutable, so that they cannot anywhere be violated without a disturbance of the order and uses of that society. Thus, as government is necessary for the public good, and established by God himself, it is consequently necessary that those who live under its jurisdiction be subject and obedient to it.* And in every form of civil government this principle must be immutably observed. So the

⁹ L. 40, ff. De Legib.; l. 2, § 9, De Orig. Jur.

* St. Paul, Rom. xiii. 1—5.

responsibility of persons entrusted with public authority is an immutable rule which cannot be violated without injury to the commonwealth; and, on the other hand, the arbitrary part of civil constitutions has its own peculiar justice in the relation of its rules or laws to the order and welfare of the civil society to which they belong, or in their fitness to define or determine matters regarding the application of immutable laws which the latter do not settle or clothe with a definite form. These observations apply to all kinds of civil polities.

The most general classification of forms of government has reference to the distribution or nondistribution of the parts of the sovereign power. In considering the connexion of the *jura majestatis* with each other, we have seen that the obvious and effectual mode of securing the unity of the sovereign power, is to vest it undivided in some one person or body of persons.* This, indeed, suggests the most simple and probably the most ancient idea of civil government. It is that of a sovereign governing the whole state with the plenitude of civil power, whether the sovereign be a natural person, or an aggregate politic person. This sort of politic constitution is called a regular state or government. It is defined by Pufendorf to be a state in which all the citizens in general and each in particular are governed, as it were, by one soul, that is to say, in which the sovereign power, without being in any way divided, is exercised by a single will in all the parts and all the affairs of the state.¹ Other writers also give the name of simple to this form of government, as contradistinguished from composed or irregular polities,² in which the branches of the sovereign power are divided and distributed. Regular or simple polities form a class distinguished by the characteristic of undivided unity of the sovereign power, but including three distinct species. For there are three sorts of forms of regular government, according to three different constitutions of the sovereignty. Where the sovereignty resides in the general assembly of all the citizens, it is called democracy; where it is in the hands of an assembly, composed of some select citizens, the state is an aristocracy; and when the sovereignty is vested in one person, the constitution is a monarchy. In the first sort of government, the sovereign is called the people; in the second, the optimates or principal persons of the state; and in the third, the monarch or king.³ The two first forms of government just mentioned, where the sovereignty resides in many persons, are called republics, and the last, where it is vested in one person, are named monarchies or monarchical

* Chap. XXII.

¹ Pufend. Droit des Gens, liv. 7, ch. 5, § 3.

² Zallinger, Inst. Jur. Nat. et Eccles. Publ. lib. 3, cap. 2, § 199.

³ Pufend. ubi sup.

states.⁷ Some writers mention a third sort of republic, which they call an oligarchy, in which the government is in the hands of a few persons, to distinguish it from others, where the government is in the hands of a greater number.⁸ But it is difficult to lay down any general rule distinguishing an oligarchy from an aristocracy, or government of a few; and the term oligarchy has frequently been used rather by way of condemnation than as expressing any definite principle of Public Law. These forms of civil government we will now examine. But in doing so we can only consider the characteristics of each sort, for every particular state has peculiarities of constitution belonging to its own municipal law, but which do not affect the essential character of the government. So in the old French monarchy, the colleges of magistrates, called Parliaments and Companies of Justice, and their right of registration and remonstrance, formed an important part of the political and social system there, without altering the despotic nature of the government. These, which we may call municipal peculiarities, relate to the machinery and mode of operation of the government in its different departments, and they arise from a variety of causes. Often we find reasons assigned for them, which were not thought of at the time of their origin, nor long after. And the real causes of institutions are for the most part arbitrary or accidental. But, on the other hand, many things in public administration and government are caused by the operation of reason, and the wants and circumstances, religious, moral and material, of the people and their country. These causes produce the infinite variety of institutions and laws to be seen in the government and administration of different countries.

We will begin with the examination of the republican form of polity, because that constitution leaves the sovereignty in the community or general body politic, to which it primarily belongs.

The nature of a republic has been a subject of controversy among political writers. It is thus considered by Madison, in the *Federalist*.⁹ "What then are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers to the constitutions of different states, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised

⁷ Domat, *Droit Publ.* liv. 1, tit. 1; Montesq. *Esprit des Loix*, liv. 2, ch. 1.

⁸ *Ibi.*

⁹ *Federalist*, num. 39, p. 204.

in the most absolute manner, by a small number of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy, in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with a hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are as nearly dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions."

"If we resort for a criterion to the different principles on which the different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers, directly or indirectly, from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behaviour. It is *essential* to such a government, that it be derived from the great body of the society, not from an inconsiderable portion or a favoured class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honourable title of republic. It is *sufficient* for such a government, that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character. According to the constitution of every state in the Union, some or other of the officers of the government are appointed indirectly by the people. According to most of them, the chief magistrate himself is so appointed. And according to one, this mode of appointment is extended to one of the co-ordinate branches of the legislature. According to all the constitutions, also, the tenure of the highest offices is extended to a definite period, and, in many instances, both within the legislative and executive departments, to a period of years. According to the provisions of most of the constitutions again, as well as according to the most respectable and received opinions on the subject, the members of the judiciary department are to retain their offices by the firm tenure of good behaviour."

The description given by this high authority is that of a regular or simple democratic republic, or democracy, in which the body of the people exercise the whole sovereignty by themselves, or their representatives and officers. And the examples which he gives of improper applications of the term republic—such as Venice—are mixed govern-

ments in which the sovereign power is distributed, and only part of it is vested in the people, or some portion of them. Thus, at Venice, the doge holding office for life was in the nature of a monarch, so far as his powers extended. And the only citizens, properly so called, were the nobility,^b in whom the sovereignty resided, and who elected the doge. The rest of the people were merely subjects of the republic. So in Poland there was a combination of the monarchical and republican principles,—the real sovereignty residing in the nobles, while the rest of the nation were not citizens, but subjects only. These mixed governments are called by different names, according as the greater part of the sovereign power is, or seems to be, vested in one person, in a few, or in the many. But the only way of forming an accurate idea of them, according to the principles of Public Law, is to analyze the sovereign power, and assign to each part its proper place in the classification of forms of government with the name belonging to it.

Madison, as we have seen, holds it essential to a republic that the government be derived from the great body of society. His definition includes only a democracy. But it gives us the principle of a more general definition. That principle is the sovereignty of the citizens, who, as Contarini shows, may be either the whole community, or only one class or part. We may, therefore, define a republic to be that form of government which derives its powers, directly or indirectly, from the body of the citizens, and is administered by persons holding office during pleasure, for a limited period, or during good behaviour. This limitation of the tenure of office is essential to a regular or simple republic, because the institution of an irremovable magistrate for term of life, or with hereditary succession, would be an absolute alienation of part of the sovereignty of the citizens, and so partakes of the monarchical principle. And so an irresponsible magistrate is contrary to the nature of a republic.^c When the body of the citizens comprehends the great body of society, the republic is a democracy; and when they are only one privileged class or part, it is an aristocracy.

The primary idea of a republic is that of a society of citizens, who assemble and make laws, and administer the government in person. But it is impossible for them to do in person all that the public service requires. They must, therefore, appoint officers and magistrates, to whom they delegate various powers and functions. When the citizens are very numerous the transaction of business in the general assembly becomes difficult or impracticable.^d This applies specially to democracies. Then, in some cases, their power falls into the hand of a

^b Cardinal Contarini, *Della Repub. e Magistr. di Venetia*, lib. 1, pp. 28, 29.

^c *Federalist*, numb. 70, p. 381.

^d *Pufend. Droit des Gens*, liv. 7, ch. 5, § 7.

smaller body. Thus Pomponius says—*Deinde quia difficile plebs convenire capit, populus certe multo difficilius in tanta turba hominum: necessitas ipsa curam republicæ ad senatum deduxit. Ita cæpit senatus se interponere: et quidquid constituisset observabatur: idque jus appellabatur senatus-consultum.*^{*} But another solution of the difficulty is furnished by the great modern invention of the political representation of the people, which we must now examine. And our investigations will apply, not merely to commonwealths or republics, but also to the republican or popular element of mixed government, such as that of our own country.

Montesquieu has some judicious general reflections on popular elections. "The people," he says, "should themselves do what they can in person perform, and execute the rest by ministers, and these must be appointed by the people in a democracy. The people require a council or senate even more than a monarch. And the people are admirably qualified to choose those to whom they are to confide authority. They have only to determine on things notorious for this purpose. Thus they know that a particular man has served in war, and has been successful, and therefore he is fit to be chosen as a general. They know that a judge is assiduous, that he gives satisfaction to suitors, and that he has the repute of probity, and therefore he is eligible to be prætor. They have been struck with the wealth and magnificence of a citizen, and that suffices to designate him for the office of edile. All these things are better known in the market place than in a king's palace. But would the people be capable of conducting a negociation, or other public affair, and judging and taking advantage of circumstances? This they could not do."

Madison observes that a pure democracy, by which he means a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. "A common passion," he continues, "or interest, will in almost every instance be felt by a majority of the whole; a communication and concert results from the form of the government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such democracies have ever been spectacles of turbulence and contention, have ever been found incompatible with personal security or the rights of property, and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they

^{*} L. 2, § 9, ff. De Orig. Jur.

[†] Montesq. *Esprit des Loix*, liv. 2, ch. 2.

would at the same time be perfectly equalised and assimilated in their possessions, their opinions, and their passions."

"A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and offers the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure, and the efficacy which it must derive from the union.

"The two great points of difference between a (pure) democracy and a republic are, first, the delegation of the government, in the latter to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country over which the latter may be extended."

"The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such regulation it may well happen that the public voice pronounced by the representatives of the people will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people. The question resulting is, whether small or extensive republics are most favourable to the election of proper guardians of the public weal; and it is clearly decided in favour of the latter, by two obvious considerations."

"In the first place it is to be remarked, that however small the republic may be, the representatives must be raised to a certain number in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence the number of representatives in the two cases, not being in proportion to that of the constituents, and being proportionally greatest in the small republic, it follows that if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice."

"In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center

in men who possess the most attractive merit, and the most diffusive and established characters."

"It must be confessed, that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie: by enlarging too much the number of electors you render the representative too little acquainted with all their local circumstances and lesser interests; as, by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal constitution forms, in this respect, a happy combination, the great and aggregate interest being referred to the national, —the local and particular, to the state legislatures."

"The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of a republican than of a democratic government; and it is this circumstance, principally, which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party, and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens, or, if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in union with each other. Besides other impediments, it may be remarked, that where there is a consciousness of unjust and dishonourable purpose, communication is always checked by distrust, in proportion to the number whose concurrence is necessary."*

These reflections show the reasons on which the delegation of popular government to representatives is grounded, and the principle on which it should be regulated. That delegation is a necessary consequence of a constitution in which power is vested in a body so numerous, or spread over so large a territory, that it cannot act except by its representatives. Therefore in such a constitution representation is an immutable law—*juris gentium*. For without it the government could not be carried on. Another immutable law is, that this institution should be so regulated as really and fairly to represent the whole body in whom the power is vested, to be exercised by delegation. Subject to this principle, the laws regulating political representation

* Federalist, num. 10, p. 52—55.

are for the most part arbitrary or mutable laws. As for the composition of the constituency, that depends, not on any principle of natural law, but on the form of the government or constitution. We have seen that in a democratic state the government is derived from the great body of society. The constituency must therefore be that body. In an aristocracy the representative system is less required, because the number of the citizens is smaller, since they consist only of the nobles, optimates, or patricians. So at Venice the great council was composed of the body of the patricians. But a body of patricians many elect representatives, as the peers of Ireland and Scotland do. And in an aristocracy, the constituency is necessarily composed of a small number out of the entire body politic. These distinctions between democracy and aristocracy show the spirit of the laws which determine by whom the representatives are to be chosen, according to the form of the government in each state. But there is no immutable principle of Public Law defining and prescribing forms of civil government. And the laws determining what portion of the body politic exercise in each state political power by their representatives, are mutable arbitrary laws. The equity of those laws, like that of other laws of the same sort, depends on their relation to the order of society and their adaptation to its purposes or uses. And in this sense they are indirect consequences of the two primary laws on which society is constructed. However extended may be the body of citizens in whom the government of a democracy is vested, and who exercise their political powers through their chosen representatives, many members of the general body politic or state must be excluded from the electoral franchise by reason of actual or presumed incapacity. And of such exclusions the legislature must judge with reference to the public service and welfare. So Montesquieu says that the laws establishing the right of suffrage are fundamental laws of the government.^b Whether the government be a democracy, an aristocracy, or a mixed form of government, the laws defining the electoral franchise are arbitrary or mutable laws, to be framed in accordance with the spirit of the particular constitution and the greater advantage of the community. The following observations of Professor Story on this important subject well deserve our attention.^c

"It is obvious that even when the principle is established that the popular branch of the legislature shall emanate directly from the people, there still remains a very serious question, by whom and in what manner the choice shall be made. It is a question vital to the system, and in a practical sense decisive as to the durability and effi-

^b Montesquieu, *Esprit des Loix*, liv. 2, ch. 2.

^c Story, *Comment. on the Constit. of the United States*, vol. 2, ch. 9, § 576—579.

ciency of the powers of government. Here there is much room for doubt, and ingenious speculation, and theoretical inquiry, on which different minds may arrive at very different results. To whom ought the right of suffrage in a free government to be confided? Or, in other words, who ought to be permitted to vote in the choice of the representatives of the people? Ought the right of suffrage to be absolutely universal? Ought it to be qualified and restrained? Ought it to belong to many or few? If there ought to be restraints and qualifications, what are the true boundaries and limits of such restraints and qualifications?"

"These questions are sufficiently perplexing and disquieting in theory; and in the practice of different states, and even of free states, ancient as well as modern, they have assumed almost infinite varieties of form and illustration. Perhaps they do not admit of any general, much less of any universal answer, so as to furnish an unexceptionable and certain rule for all ages and all nations. The manners, habits, institutions, characters, and pursuits of different nations; the local position of the territory in regard to other nations; the actual organizations and classes of society; the influence of peculiar religious, civil or political institutions; the dangers as well as the difficulties of the times; the degrees of knowledge or ignorance pervading the mass of society; the national temperament, and even the climate and products of the soil; the cold and thoughtful gravity of the north; and the warm and mercurial excitability of tropical or southern regions; all these may, and probably will, introduce modifications of principle as well as of opinion, in regard to the right of suffrage, which it is not easy either to justify or to overthrow.^k"

"The most strenuous advocate for universal suffrage has never contended that the right should be absolutely universal. No one has ever been sufficiently visionary to hold that all persons of every age, degree, and character, should be entitled to vote in all elections of public officers. Idiots, infants, minors, and persons insane or utterly imbecile, have been, without scruple, denied the right, as not having the sound judgment and discretion fit for its exercise. In many countries, persons guilty of crimes have also been denied the right, as a personal punishment, or as a security to society. In most countries, females, whether married or single, have been purposely excluded from voting, as interfering with sound policy and the harmony of social life. In the few cases in which they have been permitted to vote, experience has not justified the conclusion that it has been attended with any correspondent advantages, either to the public or to themselves. And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principle upon which the one-half of every

^k Blackst. Comm. vol. 1, pp. 171, 172.

society has thus been systematically excluded by the other half, from all right of participating in government, which would not at the same time apply to and justify many other exclusions. If it be said that all men have a natural, equal and inalienable right to vote, because they are all born free and equal; that they all have common rights and interests entitled to protection, and therefore have an equal right to decide, either personally or by their chosen representatives, upon the laws and regulations which shall control, measure, and sustain those rights and interests; that they cannot be compelled to surrender, except by their free consent, what by the bounty and order of Providence belongs to them in common with all their race; what is there in these considerations which is not equally applicable to females, as free, intelligent, moral, responsible beings, entitled to equal rights and interests, and protection, and having a vital stake in all the regulations and laws of society? And if an exception, from the nature of the case, could be felt in regard to persons who are idiots, infants, and insane, how can this apply to persons who are of more mature growth, and are yet deemed minors by the municipal law? Who has an original right to fix the time and period of pupillage or minority? Whence was derived the right of the ancient Greeks and Romans to declare that women should be deemed never to be of age, but should be subject to perpetual guardianship? Upon what principle of natural law did the Romans, in after times, fix the minority of females as well as males, at twenty-five years? Who has a right to say that, in England, it shall for some purposes be fourteen, for others at seventeen, and for all at twenty-one years, while in France a person arrives for all purposes at majority only at thirty years, in Naples at eighteen, and in Holland at twenty-five? Who shall say that one man is not as well qualified as a voter, at eighteen years of age, as another is at twenty-five, or a third at forty, and far better than most men at eighty? And if any society is invested with authority to settle the matter of the age and sex of voters, according to its own view of its policy, or convenience or justice, who shall say that it has not equal authority, for like reasons, to settle any other matter regarding the rights, qualifications and duties of voters?"

"The truth seems to be, that the right of voting, like many other things, is one which, whether it has a fixed foundation in natural law or not, has already been treated, in the practice of nations, as a strictly civil right, derived from and regulated by each society, according to its own circumstances and interests. It is difficult, even in the abstract, to conceive how it could have been otherwise treated. The terms and

¹ 1 Blackst. Comm. 171; 2 Wilson, Law Lect. 130; Montesq. *Esprit des Loix*, liv. 2, ch. 6; 1 Tucker, Blackst. Comm. App. 52, 53.

conditions upon which any society is formed and organized must essentially depend on the will of those who are associated; or at least of those who constitute a majority, actually controlling the rest. Originally, no man could have any right but to act for himself, and the power to choose a chief magistrate or other officer, to exercise dominion over others, as well as himself, could arise only upon a joint consent of the others to such appointment; and their consent might be qualified exactly according to their own interests, or power, or policy. The choice of representatives to act in a legislative capacity is not only a refinement of much later stages of actual association and civilization, but could scarcely occur until the society had assumed to itself the right to introduce such institutions, and to confer such privileges as it deemed conducive to the public good, and to prohibit the existence of any other. In point of fact, it is well known that representative legislative bodies, at least in the form now used, are the particular invention of modern times, and were unknown to antiquity. If then every well organized society has the right to consult for the common good of the whole, and if upon the principles of natural law this right is conceded by the very union of society, it seems difficult to assign any limit to this right, which is compatible with the end proposed. If, therefore, any society shall deem the common good and interests of the whole society best promoted under the particular circumstances in which it is placed, by a restriction of the right of suffrage, it is not easy to state any solid ground of objection to its exercise of such an authority. At least, if any society has a clear right to deprive females, constituting one-half of the whole population, from the right of suffrage (which with scarcely an exception has been uniformly maintained), it will require some astuteness to find upon what ground this exclusion can be vindicated, which does not justify, or at least excuse, many other exclusions.^m Government (to use the pithy language of Mr. Burke) has been deemed a practical thing, made for the happiness of mankind, and not to furnish out a spectacle of uniformity to gratify the schemes of visionary politicians."ⁿ

The experience of our own times has confirmed these observations, by showing the evil effects resulting from the doctrine, that the universal enjoyment of political suffrage is an absolute right by natural law. That error is based on the notion already refuted, that the obligation of municipal laws arises from consent, express or implied, and that the civil State is constructed on contract. Hence arose also the opinion that no constitution of political government would be valid, that was not sanctioned by a constituent assembly of the people.

^m Paley, *Moral Philosophy*, b. 6, ch. 7, p. 392; 1 Blackst. Comm. 171; Montesq. *Esprit des Loix*, liv. 2, ch. 6.

ⁿ Burke's Letter to the Sheriffs of Bristol, 1777.

This mode of constructing governments has not been successful, for it is grounded on a fundamental error of Public Law. Perhaps the convention of Philadelphia, in 1787, may at first sight seem an authority for a contrary position. But it is not so. For that body differed essentially from constituent assemblies. It was a convention of delegates, representing confederated sovereign states, for the purpose of remodelling their union, which could only be effected by some method of that nature. And after the convention had agreed on the plan, which now forms the constitution of the United States, it was submitted to representative bodies in each state, for their assent and ratification.^o Thus the results of the deliberations of the delegates were sent back for ratification; a proceeding both wise and strictly in accordance with the principles of democracy, based on the sovereignty of the people.

Both democracies and aristocracies have this in common, that in all assemblies the decision of the majority is equivalent to that of the whole.^p And Savigny shows that this power of the majority is a rule of natural law in the constitution of moral bodies. In some cases a number greater than a majority is required, such as two-thirds; but this is matter of arbitrary or positive law. And thus the Roman civil law establishes in all cases the preponderance of the simple majority of those required to be present.^q This subject we have already considered.^r The canon law presents some instances where a simple majority does not suffice. Thus, for the election of the Supreme Pontiff, two-thirds of the votes are requisite.^s And in some cases the unanimity of a chapter is necessary.^t But this exception is founded on a special principle of law, protecting the rights of individual members of the body.

Montesquieu briefly discusses the question whether, in a commonwealth, voting should be public or secret. He cites an opinion of Cicero, that secret voting was one of the causes of the fall of the Roman republic.^u The conclusion of Montesquieu is, that the votes of the people should be given publicly, and that this is a fundamental law in a democracy. The lower people, he says, ought to be enlightened by the principal men, and restrained in their choice by certain personages. But, he adds, when in an aristocracy the nobles,

^o Kent, Comment. vol. 1, lect. 10, pp. 218, 219; Federalist, numb. 34, p. 200.

^p Pufend. Droit des Gens, lib. 7, ch. 5.

^q Savigny, Traité du Droit Rom. vol. 2, ch. 2, § 97, p. 328—330; Grot. Droit de la Guerre, liv. ii. ch. 5, § 17; l. 160, § 1, ff. De Reg. Jur. Ulpian—*Refertur ad universum quod publice fit per majorem partem*. L. 5, Cod. De Legation.; l. 3, Cod. de Vend. reb. Civit.; Nov. 120, c. 6, § 1, 2; Voet ad Pand. lib. 50, tit. 9.

^r Chap. XIX.

^s Decretal. lib. 1, tit. 6, ch. 6; Devoti, Inst. Canon. lib. 1, tit. 5, sect. 1, § 3, 4.

^t Ibi, cap. 30; Fæbeus, De Reg. Jur. Canon. p. 175. See the Federalist, num. 39, p. 207, where the same principle is to be found.

^u De Legib. l. 1, 3.

or in a democracy the senate, vote, there, as solicitations and cabals are to be prevented, the suffrages cannot be too secret. For such arts are dangerous in a body of nobles and in a senate, but not among the people, whose nature it is to act by passion.^a

The laws of different countries have varied on this subject. The Doges of Genoa and Venice were elected by a very complicated method of indirect election by ballot.^b The President of the United States is elected indirectly and by ballot.^c But the choice of the members of Congress is made *vivâ voce* in some states, and by ballot in others.^d In our own country, all political and public elections, except in the East India Company and the Bank of England, are *vivâ voce*. The Council of Trent requires all elections of superiors and officers of Regulars, of both sexes, to be by secret voting.^e The ordinary form of ecclesiastical elections, called *per scrutinium*, prescribes the secret collection of the votes by scrutators appointed for that purpose.^f

It will be observed that secret voting is sanctioned by very considerable authority. In many cases this institution may be useful, or even necessary, to prevent injustice and oppression, and to secure the free exercise of the right of voting. On the other hand it may be argued that secret voting prevents that moral responsibility to public opinion under which all political liberties and privileges should be exercised and enjoyed, because they are not private rights, but in the nature of trusts held for the benefit of the community. The question whether voting should be secret depends on various circumstances in each country. The principle of law is, that every voter has a right to the free exercise of his privilege. And voting should be secret wherever open voting would not be compatible with freedom of choice, which the spirit of the law requires.

We must now briefly consider the subject of indirect election, that is to say, election by electors chosen themselves by the real constituency. This method probably was derived from the election *per compromissum* in the canon law, which is where a chapter or other electing body chooses one or more persons, and commits or delegates to them the power of electing.^g Indirect election is used in electing the President

^a Montesq. *Esprit des Loix*, liv. 2, ch. 2.

^b See my *Dissertation on the Statutes of the Italian Cities*, p. 54; Contarini, *Della Repub. e Magistr. di Venet.* lib. 2, pp. 68, 69; Harrington, *Oceano*, vol. 1, p. 113, fol. edit.

^c Story, *Comment. on the Constit. of the United States*, vol. 3, p. 312, § 1448; Kent, *Comment.* vol. 1, part 2, lect. 14, p. 276.

^d Story, *Comment.* vol. 2, p. 290, § 824.

^e Concil. Trident. sess. 2, cap. 25, *De Reg.*

^f Lancelot, *Inst. Jur. Canon.* lib. 1, tit. 6, § 9; Devoti, *Inst. Canon.* l. 1, tit. 3, sect. 1, § 18; Decretal. lib. 1, tit. 6, cap. 42, *Quia propter*.

^g Decret. lib. 1, tit. 6, cap. 30, 33, 42; Devoti, *Inst. Can.* lib. 1, tit. 5, sect. 1, § 20.

and the senate of the United States, and was the mode of choosing the Doges of Genoa and Venice. In the United States, the house of representatives, like one branch at least of all the state legislatures, is elected immediately by the people.* And this mode is calculated to obtain the fullest representation of their opinions, feelings, and interests. But the election of the senate by the state legislatures is a recognition of the separate existence and sovereignty of the states.^f And it also tends to the choice of the most eminent persons as senators, since they are selected by bodies, themselves selected for the performance of legislative functions. This is one effect of elections by selected electors. With regard to the president, the same reasons obtain. The choice is indeed committed to men chosen by the people for that particular purpose. "It was equally desirable," says Mr. Hamilton, "that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation, and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation. It was also peculiarly desirable to afford as little opportunity as possible to tumult and disorder."^g This last reason is perhaps the least forcible. The most important one with respect to the election of senators is, that the senate, chosen by persons elected in their turn by representatives of the people entrusted with high functions, are more likely to possess the qualities of stability, deliberation, and mature prudence, than the house of representatives, which comes immediately from the people, and is presumed to partake with a quicker sensibility of the prevailing temper and irritable disposition of the times, and to be in more danger of adopting measures with precipitation, and changing them with levity.^h Such are the arguments of Public Law on which this peculiar institution is sustained. The method followed at Genoa and Venice was more complicated, and partly intended to prevent cabals, factions, combinations, and the exercise of illegal influences. For this purpose secret voting was combined with chance. The Doge of Venice was elected by nine different acts, namely, five elections alternating with four acts of drawing lots, with the addition of collateral votings. And the Master of the Knights of Malta was elected by seventeen consecutive elections of electors, each connected with oaths.ⁱ

* Federalist, num. 39, p. 205.

^f Kent, Comment. vol. 1, lect. 11, p. 225.

^g Federalist, numb. 68, pp. 367, 368; Kent, Com. vol. 1, part 2, lect. 11, p. 225.

^h Kent, Comment. vol. 1, part 2, lect. 11, pp. 226, 227.

ⁱ Lieber on Civil Liberty, p. 142.

CHAPTER XXIV.

OF REGULAR STATES.—SIMPLE OR REGULAR MONARCHY.—HEREDITARY
AND ELECTIVE MONARCHY.

Monarchy—Tyranny—Limited Monarchy of two sorts—Montesquieu's Distinction between Monarchy and Despotism—General Principles of Monarchical Government—Effect of intermediate Powers—Influence of the Church—Absolute Power and limited Power—The different sorts of Laws that modify the Royal Authority—Promises and Oaths of Sovereigns—Distinction between Sovereign and Absolute Power—The *Commissory Clause* or Clause of Forfeiture—The two Classes of Fundamental Laws limiting the Royal Authority—Power to change Fundamental Laws and the Constitution of a State—In what Sense an Absolute Monarch is above the Law—Hereditary and Elective Monarchy considered—Agnatic and Cognatic Succession—The Salic Law—Different Modes of Election—Interregnum—Death of an hereditary King, leaving his Widow with Child—Precedents in History.

WE have now to examine the remaining one of the three regular or simple forms of government, that is to say, simple monarchy. This sort of polity consists of a state in which the sovereign power is wholly vested in one person, who, whatever may be his style or title, is the monarch or prince.¹ Thus Grotius shows that the title of king does not always carry with it the sovereign authority. And on the other hand, even where there are assemblies, such as the states-general of a kingdom, composed of the prelates, the magnates, and the representatives of towns; the entire sovereign power may be vested in the monarch, because those assemblies may be only a council to the sovereign.²

St. Thomas Aquinas argues in favour of monarchy, that it is the form most conducive to the unity of government and the preservation of concord, and this is a fundamental principle of the monarchical polity.³ But, he adds, as the government of one is the best if it be just, so it is the worst if of a contrary description. For the very unity which renders it effectual to produce good, makes it powerful for evil if it be directed to evil. Moreover, a government is rendered unjust by rejecting the welfare of the greater number, and seeking the private advantage of the ruling power; therefore it is so much the more unjust in proportion as it departs from the common good.

¹ Zallinger, *Inst. Jur. Nat. et Publ.* lib. 3, cap. 2, § 203; Pufend. *Droit des Gens*, liv. 7, ch. 3, § 9.

² Grot. *Droit de la Guerre*, liv. 1, ch. 3, § 10.

³ *Div. Thom. De Regim. Princip.* lib. 1, cap. 2.

Now an oligarchy, in which the interests of a few are consulted, is further from the common good than a democracy, in which the advantages of a multitude are sought; and a tyranny, which is for the good of one man, is still further from the common welfare. Therefore, he concludes, the government of a tyrant is the most unjust of all. And it is best that a just government be that of one, in order that it may be stronger. But if it decline to injustice it had better be that of many, because it will be weaker, and they will check or impede each other. Thus, among unjust governments, the most tolerable is democracy, and the worst is tyranny.^a These observations are valuable, as showing the principle of both the advantages and the dangers of simple monarchy; and also pointing out the spirit of mixed governments, in which different powers check and counterpoise each other for the purpose of preventing the unjust use of power. The term *tyrant* has not always been used in an unfavourable sense;^b and like that of *oligarchy*, it is sometimes applied as a mere general term of condemnation. But in its strict and correct sense, it is well explained by the passage of St. Thomas above referred to.^c Justice is the end of government, and necessary to every sort of commonwealth or state.^d And injustice is an essential characteristic of tyranny. Grotius, it is true, holds that a civil government may be established for the advantage of its sovereign.^e But this position is partly connected with his unsound opinion regarding what he calls patrimonial kingdoms; and Grotius himself means that a civil government, intended for the advantage of the sovereign, may be also for the advantage of his subjects; in which case it would not necessarily be a tyranny. The sound doctrine is that of St. Thomas Aquinas, that a government is unjust which has for its object the advantage, or interest or pleasure of him or those who govern, and not the welfare of the community. And this principle, simple monarchy has, in common with other forms of civil polity, though it may seem at first sight to be chiefly for the glory and enjoyment of the monarch, and has sometimes been so understood.^f The most important classification of monarchies divides them into two sorts, absolute and limited monarchies. The former are those in which the whole sovereign power, without restraint or restriction, is vested in the prince. The latter are those in which his

^a Div. Thom. De Regim. Princip. lib. 1, cap. 3. And see Mariana de Rege, lib. 1, cap. 2.

^b Grot. Droit de la Guerre, l. 1, ch. 3, § 8, n. 56.

^c And see St. Thom. Aquin. De Regim. Princ. lib. 1, ch. 10.

^d Federalist, num. 47, p. 283; Div. August. De Civ. Dei, lib. 19, cap. 21.

^e Grot. Droit de la Guerre, liv. 1, ch. 3, § 8, num. 15.

^f Vattel, Droit des Gens, liv. 1, ch. 4, § 39.

power is modified and restricted. This is effected in two different ways, which distinguish limited monarchies into two distinct classes. In one of these classes the authority of the prince is limited by fundamental laws which restrict its extent or define the mode whereby it is to be exercised, or affect it in both these ways. The other class is that of monarchies, in which the sovereign power is distributed, so that the whole is not confided to the prince. These are mixed or irregular monarchies, of which we shall treat in a subsequent chapter; and we must in this confine our attention to the former class.

Montesquieu distinguishes between monarchy and despotism, describing the former as a polity in which one man governs by fixed and established laws, and the latter as that in which all is subject to the arbitrary will of the prince without rule or law.¹ A subsequent chapter shows that by despotism he meant a mere tyranny of which scarcely an example can now be found, and which hardly deserves the name of a government." For all those which are usually called despotic governments in the civilized world have laws of some sort, which, if they do not limit the extent of the royal authority, regulate its exercise, so as to prevent hasty and crude measures, and protect the crown and the people from caprice and passion. This is for the most part effected by means of councils and other assemblies and conferences of that nature, by the use of responsible ministers and officers, and by the establishment of fixed methods of administration, with a gradation of offices through which the acts of the government must pass. And the exercise of the royal authority in pure monarchies is also affected by divers influences, social and political. Thus Montesquien says, "Intermediate, subordinate, and dependent powers constitute the nature of monarchical government. I say intermediate, subordinate, and dependent powers, because in a monarchy the prince is the source of all political and civil power. These fundamental laws necessarily suppose minor channels through which power flows; for if there be in the state only the momentary and capricious will of one man, nothing can be fixed, and consequently there can be no fixed fundamental law."

"The most natural intermediate subordinate power is that of the nobility. It is in some measure essential to monarchy, the fundamental maxim of which is—*no monarch, no nobility; no nobility, no monarch*. But there may be a despot." . . . "The power of the clergy, which is dangerous in a republic, is convenient in a monarchy, especially in those which tend to despotism. What would have happened in Spain and Portugal, after the loss of their laws,

¹ Montesq. *Esprit des Loix*, liv. 1, ch. 1.

² *Ibi*, ch. 5.

without that power which alone stops arbitrary power? . . . The English, to favour liberty, have taken away all the intermediate powers that formed their monarchy. They are right to preserve that liberty. If they lost it they would be one of the most enslaved nations in the world. Mr. Law, with equal ignorance of the republican and the monarchical constitution, was one of the greatest promoters of despotism ever seen in Europe. Besides the unprecedented and sudden changes that he made, he wished to destroy the intermediate ranks and the political bodies; he was dissolving the monarchy by his visionary financial operations, and seemed to aim at buying the constitution itself." *

These intermediate powers practically modify absolute power in a monarchy. And so we find that the Church and the nobility, and the rise of the local governments of the cities and communes, were the first causes of political liberty in Europe. And this is especially true with regard to the Church, which, when all the civil elements of modern society were in decadence or infancy, was youthful, yet fully constituted, and possessed of moral life, energy, laws, discipline and interior movement. The Church appears, in the fifth century, as an independent constituted society, interposed between the masters of the world—the sovereigns,—the possessors of temporal power on one part, and the people on the other; a link between them, and acting upon all.⁷ These reflections apply to all monarchies, and show the spirit of the civil institutions, or machinery by which they act. We have yet to see the distinction between limited monarchies of the first class, already defined, and absolute monarchies.

This distinction depends on the nature of the fundamental laws regarding the regal authority. Pufendorf observes that the term absolute power does not necessarily import a power morally without bounds, which would amount to licence and the impunity of wrong. For as in a condition free from the social state, the absolute and sovereign liberty of every one consists in his regulating his conduct as he thinks proper, and without consulting any one, but without prejudice to the laws of nature, to which he is bound to conform, so, in like manner, when many persons are united to form a perfect state or politic society, that body, as a *common subject*, must preserve the same liberty with reference to the things concerning the public good, a liberty accompanied by a sovereign power, or a right of prescribing things of that nature to the citizens, and compelling the disobedient to obey. Thus, in every state, properly so called, there is always an

* Montesq. *Esprit des Loix*, liv. 1, ch. 4.

⁷ Guizot, *Cours d'Hist. Mod.* leçon 5.

absolute power, though it is not always actually exercised ; for there is a contradiction in saying that any one is independent, and yet that he has not the power of managing his own affairs as he thinks fit. This absolute power does not in itself include anything unjust or insupportable. For the object of civil societies is not to trample under foot with impunity the natural laws, and to consult only passion or caprice ; but, on the contrary, they are established for the purpose of procuring more conveniently mutual security by the united power of many, and consequently to practise in peace and safety the rules of Natural Law.*

But if sovereignty be considered in the *proper subject*, in which it resides precisely, it is not always accompanied by an absolute power, and there are countries where it is restricted or modified by certain laws. This diversity of administration does not appear in purely popular states. For, though every democracy must necessarily have certain regulations, established either by usage or by written laws, which define the time and place of assemblies, and who is to convoke them, or propose public affairs, or execute the ordinances of the people, without which no civil society can be conceived ; nevertheless, as the sovereign assembly is composed of all the citizens, or their representatives, and so no one out of it has acquired any irrevocable right by its decisions, nothing prevents the people from revoking and altering the laws, unless they have sworn to observe any law perpetually ; and even then, that oath binds those only who have taken it. In some popular states, for the purpose of rendering some law perpetual, a penalty has been established against any one proposing an alteration ; but that penalty may be repealed, as well as the law itself.^a

But in aristocracies and monarchies, where those who govern are distinct from those who obey, so that the latter may acquire some vested right, by virtue of the promises and conventions of the others, the difference is manifest between *absolute power* and *limited power*. Kings and sovereign magistrates are, therefore, absolute, when they govern the state as they think fit, and as circumstances require, without consulting and asking the consent of any one, or following certain fixed and perpetual rules. Thus, as Pufendorf observes, so far from the term absolute implying something odious and insupportable to free persons, that princes who wish conscientiously to acquit themselves of their duty, are thereby bound to a greater vigilance and circumspection than those whose task is marked out, and who cannot deviate from certain laws.^b But, he continues, as a single person may

* Pufend. Droit des Gens, liv. 7, ch. 6, § 7.

^a *Ibi*, § 8.

^b *Ibi*.

easily err in determining what concerns the public good, and as all princes have not virtue and resolution sufficient to moderate their passions when everything is in their power, many nations have thought it best to set boundaries to the power of their sovereigns, prescribing the way in which they are to govern, especially since it has been observed that the disposition of each nation, and the constitution of each state, require peculiar laws and modes of government. By this limitation of sovereignty no injury is done to princes raised to the throne by the free consent of the people. For if they could not submit to hold a limited authority they could have refused the crown.^c And, as we have already shown, there is no immutable law prescribing any given form of government. Therefore, the constitution of states, and the different modifications of the sovereign power, are arbitrary matters, to be regulated according to circumstances, as the objects of society and the welfare of nations require. And God has nowhere defined what degree of power should generally be given to those who are invested with royal authority.^d We have now to examine the different sorts of laws which modify the sovereign authority.

Pufendorf justly observes that the promises of kings (and it is the same with senators in a sovereign council) do not always limit their authority. And he distinguishes between general and particular or specific promises. The former sort he divides into two classes—tacit and express. Tacit promises are those implied by mere accession to the royal dignity. But these supposed tacit promises are in truth a mere fiction, like that of Trebonian regarding obligations, which he names—*obligationes quæ quasi ex contractu nascuntur*;^e and the obligations of a sovereign who enters into no express promise or engagement arise, not from an implied or presumed promise, but from the law, whether natural or municipal, and the obligations of Religion. The express general promises are frequently accompanied by certain solemnities, and confirmed by an oath. Sometimes the promise describes the sovereign's duties, either by general terms, or with an enumeration of their principal parts; the prince promising, for instance, to watch carefully over the public welfare, to protect the good and repress evil doers, to administer justice with integrity, to oppress none, and the like. But all this does not diminish his absolute power, for in the means proper to procure the advantage of the state he is left to his own judgment, as well as with regard to the mode of using those means.

^c Pufend. Droit des Gens, liv. 7, ch. 6, § 9.

^d *Ibi*; Domat, Droit Publ. liv. 1, tit. 1.

^e Inst. lib. 3, tit. 8.

The express, particular, or specific promise comprehends a special engagement to govern according to certain prescribed rules called fundamental laws. It is made in two ways. For either it is simply binding on the conscience of the prince, or it is a necessary condition, the breach of which absolves the subjects from obeying. In the former case, though the power of the prince is limited by his promise, and if without necessity he pass the limits which it prescribes, he violates his royal word, his subjects are not thereby free to disobey his authority, nor to annul whatever he has done contrary to his promise. For there may be reasons requiring that established rules be set aside. A promise of this nature must not be held binding in extraordinary cases, where necessity or a great public good dictates an exception to its terms.¹ And it is for the Prince to judge whether the urgency or importance of the case justify a deviation from the law. Therefore Pufendorf concludes that a nation who wish to give a limited authority to their Prince, should take the precaution of establishing some assembly, without the consent of which he can do nothing in those matters whereof he is not to be absolute master, or require the Prince to convoke a general assembly of the people or of all the magnates, whenever those matters are to be decided. And the latter is the better method, because such large assemblies are less likely to be swayed by interests contrary to the public good than a few. When a nation have stipulated with the king that they shall not be bound to obey him in all things, without the consent of an assembly of the people or their representatives, this is another sort of particular promise which imposes on the king a far more strictly binding obligation, in virtue of which all that he does contrary to the fundamental laws is void.² This species of constitution may also be without any specific promise on the part of the king, or the promise may be merely subsidiary to the fundamental laws of the state which so restrain the royal authority. And a promise to govern according to the laws of the country must be understood as a specific engagement in the terms of those laws. Such is the first part of the Coronation Oath prescribed by stat. 1 Will. & Mary, st. 1, c. 6. And so Blackstone says that the principal duty of the king is to govern his people according to law.³ Pufendorf argues that an engagement limiting the sovereign authority by requiring the assent of a popular assembly to give validity to his acts, does not render the sovereign power defective. He distinguishes very correctly between sovereign power and absolute power. The former, he says, is a power

¹ Lampredi, *Diritto Pubblico*, tom. 3, p. 19. In cases of this nature, a bill of indemnity is resorted to in this country.

² Pufend. *Droit des Gens*, liv. 7, ch. 6, § 9, 10.

³ Blackst. *Com.* vol. 1, ch. 6, p. 233.

which has no superior or equal in the order of beings; while the latter imports full liberty to exercise rights, without consulting any but one's own judgment.¹ He cites Grotius on this subject. But that writer only lays it down that sovereignty is not the less sovereignty where the prince, at his accession, solemnly engages to his subjects, or to God, that he will observe certain things, even regarding the government of the state, which the natural or divine law, or the law of nations, do not require of him. For he says that a head of a family does not lose his chiefship by entering into a promise towards the members of the family, though he is bound to keep his promise.²

The doctrine of Pufendorf is correct so far as regards his distinction between sovereign and absolute power. But when the Prince cannot do certain acts, such as make laws or impose taxes, without the concurrence of an assembly, it is evident that the sovereign power is divided, and the government becomes no longer regular or simple, but mixt and irregular. And this sort of constitution is indeed the only method of effectually limiting the power of the prince. Grotius, it is true, holds that the sovereign power is not truly divided where the king declares that if he do certain things without the consent of a senate, or some other body, they shall be null. But the reason which he gives for this position is, that in such a case the acts done without the required assent are annulled by the authority of the king himself, whose intention was to prevent anything obtained by surprise from being taken as his will. And he compares this to the case of a clause in a testament declaring that any subsequent testament shall be void. For such a disposition raises a presumption that a later testament was not executed seriously. But the clause may become of no effect by express revocation of the testator. And so the declaration of the prince, regarding the nullity of certain things which he has done or ordered, may lose its force by a new order, and a particular notification of his later will and pleasure.³ The parliaments under the old French monarchy afford an example of this kind. Thus it appears that Grotius refers to a species of case in which the sovereign power is not divided, though a specific method is laid down for its exercise, and it is thereby limited.

There may be fundamental laws or engagements between sovereign and people, containing an express *commissory clause* whereby he is declared to forfeit his crown if he violate those laws. This clause must, as Pufendorf observes, be express, because if it provide merely

¹ Pufend. ubi sup. § 10.

² Grot. Droit de la Guerre, liv. 1, ch. 3, § 16.

³ Grot. Droit de la Guerre, ubi sup. § 18; and see note 4, by Barbeyrac, regarding an opinion of Cujacius, Observ. lib. 14, cap. 7.

that in the cases contemplated, the subjects shall not be bound to obey, that has not the effect of a *commissory clause* which deprives the Prince of all his rights if he violate certain restrictions. The ancient laws of Arragon are said to have presented a remarkable instance of this forfeiture. For it is alleged that the oath of the people of that country to their king was expressed to be binding only if the king observed their liberties and laws, and not otherwise.^m And there is a provision of the same nature in stat. 1 Will. & M. st. 2, c. 2, and 12 & 13 Will. III. c. 2, for the purpose of preventing the crown from being possessed by a Roman Catholic, or any one married to a Roman Catholic. No absolute monarch holds his crown subject to forfeiture. But in a limited monarchy the prince may be bound by a *commissory clause*, and yet be invested with a royal authority. For that authority is held on a condition which it is in the power of the prince himself to fulfil.ⁿ And this is the opinion of Grotius, who holds that the effect of the clause is to limit the mode of possessing the sovereignty, without altering its nature. A commissory clause may, he observes, be added, not only to conventions between a king and a nation who confer on him the sovereign authority, but to other sorts of contracts, and their nature is not thereby changed. And treaties with foreign states are made subject to this condition.^o Grotius indeed establishes that this clause is tacitly included in all treaties of alliance.^p

We deduce from these reflections on fundamental laws, limiting or modifying the sovereign power, that they may be divided into two classes, namely, those binding on the prince, so that he cannot repeal or alter them; and those which he has the power of abrogating and changing. Those of the former class are the laws referred to by Vattel, where he says, that "when the sovereign power is limited and regulated by the fundamental laws of the state, they teach the prince the extent and limits of his power, and the manner in which he is to exercise it. He is strictly bound not only to respect them, but to maintain them. The constitution and the fundamental laws are the plan by which the nation has resolved to work out its happiness. The execution is confided to the prince."^q And so Fortescue says, "Neither can a king" (where the government is limited), "who is the head of the body politic, change the laws thereof, nor take from the

^m Hallam, Middle Ages, vol. 2, p. 64, note.

ⁿ Pufend. Droit des Gens, liv. 7, ch. 6, § 9.

^o Grot. Droit de la Guerre, liv. 1, ch. 3, § 16.

^p *Ibid.*, liv. 2, cap. 15, § 15. See as to the commissory clause or *commissoria lex*, Voet ad Pand. lib. 18, tit. 3, § 1—6.

^q Vattel, Droit des Gens, liv. 1, chap. 4, § 46.

people what is theirs, without their consent.”^r And Bracton says, “The king ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king, therefore, render to the law what the law has invested in him with regard to others, dominion and power, for he is not truly king where will and pleasure rule, and not the law.” And again, “The king also hath a superior, namely, God, and also the law, by which he was made king.”^s

The fundamental laws of the latter class are also binding on the prince, but in a different sense, which we must now consider. Vattel examines the question, whether the person or assembly, in whom the legislative authority of a state is vested, have power to change the fundamental laws which form the constitution of the state. He holds that the nation itself has undoubtedly this right. And he admits the same power to belong to the majority, provided the change be not contrary to the very act of civil association, and the intention of those who entered into it. Thus, he says, if it were proposed to abandon the form of government to which alone the citizens were pleased to submit; as, for instance, if in a republic, the majority decided on adopting the monarchical form of polity, the dissentients would not be bound to submit to the new government. They would have a right to withdraw from the nation, and sell their lands, and emigrate with their movable property.^t

This doctrine is based mainly upon the hypothesis of a state formed by contract of association or original contract. But contract is not, as we have seen, the origin of civil societies or states; and we do not find that when the form of a state is totally changed, as repeatedly occurred in France, the right of the minority to throw off their allegiance to the sovereign power has been recognized. And this is in accordance with the principles of Public Law, for the obligation of submitting to the civil government, lawfully established, does not arise from the consent of the citizens, but from the two primary laws on which civil society is constructed. The power of emigrating, and throwing off citizenship or allegiance, depends in each country on its municipal laws; and this is a matter of arbitrary or positive law.^u

Vattel next examines the important question, whether the legislative power of a state is competent to change the fundamental laws, thereby altering the constitution. He resolves it in the negative, unless the

^r Fortesc. *De Laud. Leg. Angl.* c. 13. And see Mariana, *De Rege*, lib. 1, cap. 2, p. 23.

^s Bracton, l. 1, c. 8; l. 2, c. 16, § 3.

^t Vattel, *Droit des Gens*, liv. 1, chap. 3, § 33. The same theory was used to argue that Parliament could not reform the House of Commons.

^u Lampredi, *Diritto Publ.* vol. 3, p. 196.

legislature be specifically empowered by the nation to change those laws. He alleges that the constitution of the state ought to be stable; and argues that, as the nation first established that constitution, and then confided the legislative authority to certain persons, the fundamental laws are excepted from their commission. The civil society, he says, designed only to provide that the state might always have laws adapted to conjunctures and circumstances, and for this purpose gave to the legislators power to abrogate civil laws and political laws not fundamental, and make new ones; but there is nothing to show that it was intended to submit to their will the constitution itself. They hold their authority from the constitution. How then can they change it without destroying the very foundation of their own power? If the parliament of England chose to abolish themselves and vest all power in the crown, how could the nation be bound to submit? But if the parliament deliberated on a considerable change of the constitution, and the nation remained silent, it would be held to approve the act of its representatives.*

Here again Vattel argues on a particular hypothesis, and not on general rules of Public Law. There are cases in which limited powers are conferred on a legislature. So the Congress of the United States and the state legislature are restricted in their power by the constitution, which is the supreme law of the land, and can be altered only by a method prescribed in the constitution itself.[†] And where a nation first establishes a constitution, and then confides the legislative power to certain persons, it may be argued that they cannot change the form of polity which is anterior to their own creation and commission. So far the doctrine of Vattel is sound. Whether it be applicable in a given case, depends on the municipal law of the particular country. But if this important question be solved on general grounds of Public Law, the result will be different from that at which he arrives. For, as we have seen,[‡] the nature of the sovereign power in the abstract is, to be both supreme and unlimited, that is, to comprehend the whole extent of temporal power and government. And as the constitution of the state is the form in which the nation acts as a body politic,[§] it follows

* Vattel, *Droit des Gens*, liv. 1, ch. 3, § 34. The same theory, limiting the power of Parliament, caused Junius to question the power of the legislature to disfranchise a number of boroughs upon the ground of improving the Constitution. Junius, *Letters*, *Observations* following the last letter.

† *Federalist*, pp. 143, 169; Kent, *Comment.* vol. 1, lect. 12, p. 251; lect. 15, p. 312; lect. 10, pp. 209, 210; Story, *Comment. on the Constitution of the United States*, vol. 3, pp. 685, 690; *Constitution*, art. 5.

‡ Chap. XIX.

§ Vattel, *Droit des Gens*, liv. 1, chap. 3, § 27.

that on general principles, that form contains the sovereign power, of which the most supreme part is the power of legislation. And whenever the legislative power is placed by the constitution of the state, it is, abstractedly, and unless restricted by peculiar political institutions, supreme and unlimited. This is the meaning of the doctrine sometimes called by English writers the omnipotence of parliament. Thus Blackstone says, in speaking of that assembly, "It hath sovereign and uncontrolable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding laws concerning all matters of all possible denominations; . . . this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms." . . . "It can in short do everything that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure somewhat too bold, the omnipotence of parliament. True it is, that what parliament doth, no authority upon earth can undo." ^b So parliament may give the king a legislative authority.^c Blackstone, commenting on the articles and act of union with Scotland, observes, "1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be *fundamental and essential conditions of union*." But though the learned commentator afterwards says, that an infringement (by parliament) of those conditions, such as altering the constitution of either of the established Churches of England or Scotland, without their consent, would greatly endanger the union, he does not intimate that an act of parliament, having that effect, would not be valid. And Mr. Justice Coleridge observes, in a note, that, "It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would, of itself, dissolve the union; for the bare idea of a state without a power somewhere vested, to alter every part of its laws, is the height of political absurdity."^d

These doctrines of Public Law are applicable to absolute monarchies, in which the entire legislative power of the state is vested in the prince. And thus history presents many instances of absolute sovereigns who have altered the constitution of their kingdoms by

^b Blackst. Com. vol. 1, ch. 2, pp. 160, 161; 4th Inst. 36.

^c Com. Dig. tit. *Parliament*, H. 3.

^d Blackst. Com. vol. 1, Introd. § 4, pp. 97, 98, and note.

converting them into limited monarchies. Such alteration of the form of government is valid, though it involve the division and distribution of the sovereign power by new fundamental laws, or even the conversion of the monarchy into a republic.

Having thus explained the nature of the second of the two classes of fundamental laws described above, we shall easily see in what modified sense it is that even the most absolute sovereign is said to be above the laws. Domat lays it down that the first and most essential duty of those whom God raises to sovereign authority is to recognize this truth, that *it is from God that they hold all their power*, and it is His place which they fill; that it is by Him that they ought to reign, and from Him they are to have that wisdom and understanding which should give them the art of governing. And they ought to make these truths the principles of all the rules of their conduct, and the foundations of all their duties.* These are rules of immutable law, immediate consequences of the two primary laws on which society is constructed. For it is by the spirit of those two laws that God has united men together in society, and formed the ties engaging them therein, which form the order of society. And as those engagements demand the use of government to keep every one within the order of those which are peculiar to him, God has established for that government the powers necessary to maintain society, and to accomplish its end, which is that of man, as St. Thomas Aquinas shows.[†] And as the laws of man are the rules of his conduct, directing him towards his end, so those laws must be the rules appointed by God for all sovereign powers in the performance of their duties which He has committed to them. Domat deduces the other obligations of sovereigns from the duty first laid down, and he concludes by saying:—"We may add for a last duty of the sovereign, which is a consequence of the first, and which also comprehends the others, that although his power seems to place him above the law, no one having a right to call him to account for his conduct, yet he ought to observe those laws which regard him, and he is bound to do so, not only that he may give a good example to his subjects, and render their duty easier to them, but because his power as a sovereign does not dispense with his own duty, and, on the contrary, his rank obliges him to prefer to his own particular interest the common good of the state, which it is his glory to look upon as his own good."[‡] And these principles agree with the imperial law, notwithstanding the famous law *Quod principi*

* Domat, Droit Publ. liv. 1, tit. 2, sect. 3, § 1; 2 Chron. i. 9, 10; 1 Kings, iii. 9; 1 Sam. ix. 16; Div. Thom. Aquin. De Regim. Princip. lib. 1, cap. 8.

† Div. Thom. Aquin. De Regim. Princip. lib. 1, cap. 14.

‡ Domat, ubi sup. § 14.

placuit, legis habet vigorem,^b and the law by which the emperor is declared to be *solutus legibus*.^c Cujacius explains the latter text of Ulpian to mean, not that the prince is free from all laws, but that he is, by his prerogative, exempt from the particular laws to which that text relates, and which created a forfeiture. And he says that the prince is bound by his own laws,^d though he has the power to abrogate and alter them.^e

The examination of the fundamental laws of monarchies naturally leads us to consider the distinction between elective and hereditary monarchies, and the diversities and nature of those two classes of states. This part of our subject equally belongs to every sort of monarchy, whether absolute, limited, or mixed, that is to say, irregular. And first we must examine the reasons of Public Law on which hereditary monarchy is based.

We have seen that the order of successions in human society is grounded on the necessity of continuing and transmitting the state of society from one generation to another, and this is done insensibly by making certain persons succeed to and in the place of those who die, that they may enter upon their rights, their offices, and such relations and engagements as are capable of passing to posterity.^f And the institution of hereditary succession is calculated to promote the peace and order of society, by preventing contests which would otherwise arise for things left vacant by death. In this way the law of hereditary succession is a natural consequence of the principles on which individual property is founded; for that species of *dominium* would be incomplete and insufficient for the purposes for which it is intended, if it terminated on the death of the owner.^g So this institution is of secondary natural law, even considered apart from that presumed intention of the owner on which Grotius founds the principle of heirship *ab intestato*.^h And thus Grotius holds the right of disposition by will or testament to be of natural law, as a consequence of the institution of absolute property.ⁱ

The grounds or reasons of hereditary monarchy are analogous to those of the institution of hereditary succession in the other parts of

^b L. 4, Cod. De Legib. et Const. Princip.; l. 3, Cod. De Testam.

^c L. 1, ff. De Constit. Princip.; l. 31, ff. De Legib.

^d Cujac. Recit. in Libros 4 Priores Cod. ad Tit. 14, D.; Cujac. Op. tom. 10, col. 790.

^e L. 1, ff. De Constit. Princip.

^f Domat, Loix Civiles, Traité des Loix, ch. 7, § 1.

^g Pufend. Droit des Gens, liv. 4, ch. 10, § 4.

^h Grot. Droit de la Guerre, lib. 2, ch. 7, § 3; Pufend. Droit des Gens, liv. 4, ch. 11, § 1.

ⁱ Grot. Droit de la Guerre, liv. 2, ch. 6, § 14.

human society. The perpetuity of the commonwealth seems to point out the value of a law which invests the sovereign with a sort of perpetual duration and immortality, and leaves no interval during which obedience to the prince is suspended, and the minds and opinions of men unsettled,¹ upon which human authority so mainly depends. In hereditary monarchy, as Domat observes, God himself seems visibly to dispose of the government by calling to it princes by their birth; whereas elections are liable to great inconveniences, whether by the choice of persons, which is easily misled, or by cabals and factions, and the disappointment of a defeated minority.² It must be owned that an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature. As inferior magistrates and officers are chosen for their personal merits and fitness, so it would seem that the throne should be filled by deliberate choice, and not by the accident of birth. But, on the other hand, the supreme importance of the sovereign office must necessarily exaggerate in the election of a prince the evils to which all elections are liable. And no other office can with more inconvenience, and even danger, be left vacant even for a short interval. Experience shows that though the election of kings and chief magistrates of states is recommended by the argument that the choice of the nation will probably fall on some one of the most eminent and able candidates, the result is in general different. For men of great and commanding abilities are objects of jealousy, especially to the heads of parties, who are likely therefore to combine in the choice of some one whose parts are not such as to give them umbrage, or check their ambition or their policy. A prince, moreover, whose crown will devolve upon his heirs, has a motive for diligence and zeal in the public service and the welfare of the state, beyond one whose interest is confined to the brief space of human life.³ And the latter will be strongly tempted to enrich and aggrandize his family at the expense of the state. Inheritance has indeed often placed on the throne incapable or bad princes. But, on the other hand, it is urged that all human devices are liable to inconveniences, and that this evil is, on the whole, less than those which must arise from frequently recurring elections. The experience of ancient and modern Europe has been

¹ *Et est natura datum ut res communes et imperia, magis opinione hominum quam rebus ipsis gubernentur. Pereunte obsequio imperium etiam intercidit; feruntque æquiori homines animo, quem princeps infelicitè genuit, quam qui electus est non male. Ad hæc principatus facti hereditario, perpetui gaudiummodo principes perpetuæ reipublice dantur, quod soluterrimum est.* Mariana, *De Rege*, lib. 1, cap. 3, p. 31.

² Domat, *Droit Publ.* liv. 1, tit. 1.

³ Mariana, *ubi sup.* p. 32.

unfavourable to the practicability of a fair and peaceable popular election of the executive head of a great nation ; and mankind have generally taken refuge from the evils of popular elections in hereditary executives, as being the least evil of the two.¹ The principle of hereditary succession seems pointed out, by reason and analogy, as a natural mode of transmitting from one generation to another, in a monarchy, this fundamental institution of civil society, because it is that by which society itself is preserved and perpetuated.

The succession to the throne is differently moulded and modified by the municipal laws of different monarchies. In some it is confined to the male line, while in others females are admitted, in default of males in the same degree. The former is called the *Agnatic* or Castilian, and the latter the *Cognatic* or French succession.² That which excludes females is also known as the *Salic Law*.³

Montesquieu observes that an elective monarchy necessarily supposes a powerful aristocratic body to support it, without which it changes into a tyranny or a popular state.⁴ An elective monarchy is that in which the people, or those in whom the right is vested, as, for instance, the College of Cardinals in Rome, or nobles in Poland, choose a certain person to govern the state. And as soon as the decision of the electors has been signified to that person, and he has accepted, the sovereign power becomes vested in him, or is conferred on him.⁵ There are two sorts of election, one entirely free, and the other limited or restricted in certain respects. The former is when any one whomsoever may be chosen, and the latter when a person must be chosen who belongs to a certain family or nation, or who has a certain qualification. And the right of succession may be combined with election ; for the crown may ordinarily pass to the heirs of the deceased prince, subject to the approbation or choice of the *grande*es or people.⁶ When in an elective monarchy the king dies, without a successor being designated, there is a vacancy of the throne called *Interregnum*. Pufendorf does not in all respects correctly describe this state of a civil community, because he argues on the hypothesis of original contract. But he truly observes, that as the proper subject of sovereignty ceases to exist, the state becomes an *imperfect* body politic, and partakes for the most part of the nature of democracy, because, unless the nature of the government be changed, the community itself must

¹ Kent, Comment. vol. 1, lect. 13, pp. 273, 274.

² Pufend. *Devoir de l'Homme et du Cit.* liv. 11, ch. 10, § 11.

³ Montesq. *Esprit des Loix*, liv. 18, ch. 22.

⁴ *Ibi*, lib. 11, ch. 13.

⁵ Pufend. *Droit des Gens*, liv. 7, ch. 6, § 6.

⁶ *Ibi*.

proceed to provide a new monarch. And this shows in what sense Grotius says, that when a royal family becomes extinct the sovereignty returns to the nation. That is to say, though during the interregnum the people have not properly the sovereignty, since they have not decided to place the sovereign power in the hands of the general assembly of citizens, yet the people may in the meantime exercise by themselves, or their representatives, all the acts of sovereignty which they deem requisite for their preservation. But they may either choose a new monarch, or change the government into a monarchy or an aristocracy.^b It is a wise precaution to prevent the troubles and inconveniences incident to an interregnum, by designating those who, during the interval, shall hold the reins of government. Whatever may be the title of these regents (called in Latin *Interreges*) they are temporary magistrates, exercising provisionally the authority of the state, so far at least as is necessary to preserve peace, and responsible for their administration. And their authority ceases on the election of the new monarch, or the erection of another form of polity.^c Hobbes asserts, that if a sovereign for life be created, and the citizens make no provision for electing a successor, in that case, on his death, the state is not a moral person or body politic, but a multitude without bond of union. But Pufendorf justly denies this position, for when once a number of men have submitted to the government of a king, it is not to be presumed that they intended the state to be destroyed, and the citizens reduced to a condition of anarchy on his decease. They have at least tacitly agreed that on the death of the king they will meet in the usual place of assembly, or at the domicile of the deceased sovereign: and there will probably be among them citizens possessed of sufficient influence to keep the others within their duty during the interregnum, and induce them to provide at once for the wants of the state.^d The same conclusion may indeed be arrived at without resorting to any presumed intention, for the duty of preserving society from anarchy is a natural immutable law.

A sort of interregnum arises in some hereditary monarchies when the king dies leaving the queen with child, or believed to be so, and no heir apparent actually born. Pufendorf observes that most nations

^b Pufend. *ibi*, § 7; Grot. *Droit de la G.* liv. 1, eh. 3, § 7. Our reflections on elective sovereignties are of course inapplicable to the Sovereign Pontiff, whose election belongs to the law spiritual, and whose temporal power rests on peculiar mixed grounds of ecclesiastical and temporal polity. The mode of this election is to be found in the 3rd and 6th chapters *De Elect.*, in the *Sexte*, the 2nd chap. *De Elect.* in the *Clementines*, the *Decretals*, lib. 1, tit. 6, esp. 6, &c. See *Devoti*, *Inst. Canon.* tom. 1, p. 260. As to the temporal power, see *Devoti*, p. 163.

^c Pufend. *ibi*, § 8.

^d *Ibi*, § 9; Hobbes, *De Cive*, esp. 9, § 15.

have agreed to acknowledge that a right may vest in a child in the womb, though incapable of exercising such right. While there is a proper subject of sovereignty, there is no interregnum, and therefore, when the prince is a minor or a prisoner, there is no interregnum, properly so called. But before the birth of the posthumous child, it is impossible to know whether it will be born living, or whether it will be of the male or female sex, which is necessary to be ascertained in those kingdoms that do not pass to females. Therefore, during the interval, the kingdom should be governed as during the minority of the sovereign.* And supposing that if the king had died, leaving no child either born or to be born, a real interregnum would have taken place,—the mode of governing until the result has been ascertained would be the same,—and the nation would not acquire the right of providing for the vacancy of the throne until the accouchement of the widow.^f

These doctrines are in accordance with the civil law, which gives the same rights to a child in the womb as to a child actually born.^g And so it was in the law of the French monarchy. On the death of Louis X., the presumptive heir to the throne was appointed regent, and continued so until the birth of the posthumous child. The child was a male, and therefore entitled to succeed, but it lived only eight days. At the death of Charles the Fair his widow was seven months gone with child. The presumptive heir was again made regent. The child proved a female, and consequently could not succeed to the throne by the law of France. The regent therefore succeeded.^h

The law of England is different on this point. It was held by Lord Chancellor Lyndhurst, with the assent of the late Earl of Eldon, in the proceedings in the House of Lords on the Regency Act, 1 Will. IV. c. 2, that in the event of the king's death, leaving his widow with child, the crown would nevertheless descend upon the heiress presumptive, but subject to be divested by the birth of a child of the deceased king, who would immediately become king or queen.ⁱ But these regulations of Municipal Law are here stated merely by way of illustrating the general principles explained above. The law of England, in this particular, is founded on the feudal law, which requires

* Pufend. ubi sup.

^f Ibi.

^g *Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodo ipsius portus queritur.* L. 7, ff. De Statu Hom.; and see l. 2, ff. De Excusat.; l. 9, § 1, ff. ad Leg. Falcid.; and see Fearn, Contingent Rem. ch. 4, § 1, p. 308; stat. 10 & 11 Will. III. c. 16; stat. 12 Car. II. c. 24.

^h See my Comment. on the Constit. Law of England, pp. 152, 153 (2nd edit.)

ⁱ Ibi, p. 151—154, where the subject is fully discussed.

that there should be a tenant to land, not only *in rerum natura*, but actually born, and therefore prefers the heir presumptive to the unborn heir apparent. And the law regulating the descent of the crown is governed in England by the same rules which govern the descent of real property at common law, with only two exceptions; and there is a third exception introduced by stat. 3 & 4 Will. IV. c. 106.

CHAPTER XXV.

ON MIXED GOVERNMENTS, AND THE DIVISION OF THE SOVEREIGN POWER AND THE THREE GREAT DEPARTMENTS OF GOVERNMENT.

Nature of irregular or mixed Governments—Division of the Sovereign Power—Balance of Powers in a State—How the Government of the United States of America is a limited and mixed Government—Distinction between the Distribution of Powers and the mere Division of Departments—Reasons of the Division of Departments, and of the Distribution of Powers—Principles of mixed Governments—The Utility of those Governments in particular Cases—Examination of the Nature of Liberty, Natural and Civil—Definition of Liberty by Florentinus—Liberty considered with reference to its Degree or Extent—Use of the Balance of Powers with reference to Liberty—Political Liberty—Principles on which mixed Governments are constructed—Theory of Montesquieu—Principles of Blackstone and Story—How the Division of the Three Powers of Government is rendered consistent with the Unity of Government—Doctrine of Madison on this Subject—Difficulty of preventing the Encroachments of the Three Powers on each other—Government constructed on the Principle of combining Monarchy, Aristocracy and Democracy—The Three Ingredients of this sort of Government examined—Maxim that *the King can do no wrong*—The hereditary Peerage—Privileges of the Peers—Impeachments—The Democratic Part of a mixed Constitution.

WE must now pass from the three regular or simple, to irregular or mixt forms of government, that is to say, those in which the branches of the sovereign power are not all vested in one person or body of persons, but divided and distributed.^b That division and distribution produce a number of different combinations, constituting various forms of civil polity, which in each country are regulated by a vast system of municipal laws, for the most part positive. Those laws are engendered and governed by the spirit of the particular state, and the circumstances of the people and the country, which produce a great variety of modifications in the way in which any given form of con-

^b Chap. XXIII.

stitution is constructed and worked. Nevertheless, mixt governments present certain characteristics, which enable us to range them in classes on scientific principles. It is, indeed, difficult in some instances to assign to a particular mixt government a name and place beyond the reach of dispute. The very name of mixed government explains this difficulty. Thus, some have contended that the kingdom of Great Britain and Ireland is a republic, while the received opinion is, that it is a mixt monarchy. These disputes are inevitable; but mixt forms of civil polity may nevertheless be reduced to classes, by giving them the three different names of monarchy, aristocracy, and democracy, according as the greater part of the sovereign power is vested in one person, in a few, or in the many.¹ Their mixt nature must, nevertheless, not be neglected; and regard must be had to those parts of their constitution which belong properly to another class of states, and therefore have a spirit differing from that which the denomination of the particular state indicates. But even a simple or regular government may, in the mode of its operation, have something analogous to another of the three sorts of simple government. Burlamaqui thus shows the distinction between this analogy and the true characteristics of a mixt government. "With regard to simple governments, the sovereignty may in them be either absolute or limited. Those in whom it is vested, exercise it sometimes in an absolute way, and sometimes in a manner limited by fundamental laws, which set boundaries to the power of the sovereign, with reference to the way in which he ought to govern." On this subject it is requisite to observe, that all the accidental circumstances which may modify simple monarchies or aristocracies, in some manner limiting the sovereignty in them, do not therefore change the nature of the government. A government may resemble another in some degree, when the mode in which the sovereign governs seems borrowed from it, but without alteration in the nature of the constitution. For instance, in a democratic government the people may entrust certain affairs to a senate, or a chief magistrate. In an aristocratic state, there may be a principal magistrate invested with a special authority; or even an assembly of the people, who are sometimes consulted. Or in a monarchical state, important affairs may be proposed and discussed in a senate, &c. But all these accidental circumstances do not alter the form of the government, and do not constitute a division of the sovereign power; and the state still remains purely democratic, aristocratic, or monarchical. For there is a great difference between exercising a power proper to him who exercises it, and acting by an extraneous and temporary precarious power, which

¹ Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* tom. 1, lib. 3, cap. 2, § 199, num. 3, p. 414.

may be taken away by him who gave it whenever he pleases. Thus the essential characteristic of mixt or compound commonwealths, which distinguishes them from simple governments, is this, that the different orders of the state which partake of the sovereignty possess the rights which they exercise by an equal title, that is to say, by virtue of the fundamental law, and not under a mere commission, as a minister executing the will of another. The distinction must therefore be drawn between these two things, the form of the government, and the mode of governing."^m

Mixt governments are established by the combination of the three simple forms of government, or of two only; as, for instance, when the king, the optimates and the people, or the two last only, divide among them the different parts of sovereignty, so that part is administered by one and the rest by the others. And this combination may be effected in different ways.ⁿ

We have explained,^o in considering the connexion of the *jura majestatis* with each other, that there must be a unity in the sovereign power, so that one supreme will may govern the state. But this principle of unity does not prevent a fundamental law or constitution forming a government, so as to commit the exercise of the parts of the sovereign power to different persons or bodies, acting independently of each other, within the extent of the rights belonging to each, but still in subordination to the laws by which they hold their authority. And provided the fundamental laws establishing this partition of the sovereignty, regulate the respective limits of the different powers, so that their jurisdiction may be easily seen, the division produces no conflict between them. For there is but one sovereign and one supreme will, which consist of all the orders or estates of the commonwealth, and the law itself, which is the will of the body politic or state. It results from the nature of mixt governments, that in them the sovereignty is always limited. For as all the different branches are not confided to a single person or body, but are placed in different hands, the power of those who take part in the government is thereby restricted, and the power of each is a restraint on the others. This produces a balance of power and authority, for the purpose of securing the public welfare and the liberty of individuals.^p And this is an important diversity between mixt governments and simple states, in which the sovereign power may be either limited or absolute. Thus

^m Burlamaqui, *Droit des Gens*, tom. 4, par. 2, cnp. 1, § 9.

ⁿ *Ibi*, § 6.

^o Chap. XXII.

^p Burlamaqui, *ubi sup.* § 8.

we have seen^a that there are two methods by which the authority of a monarch may be limited, that is to say, by fundamental laws restricting and defining his powers, and by the division and distribution of the sovereign power so that the whole is not confided to any one person or body of persons.

In a democracy, the former method is not applicable. For though this sort of state, like all others, must have certain regulations established by usage or written law, and which are fundamental or constitutional laws; yet the sovereign assembly of the people may at any time alter them, because the people cannot bind themselves to themselves, not to change the laws.^b Democracy can therefore be limited only by partition and distribution of the sovereign power. This partition is exemplified in the United States of America. For the whole sovereignty is neither in the States nor in the Union. The constitution of the United States is an instrument containing the grant of specific powers, and the government of the Union cannot claim any powers but what are contained in the grant, and given either expressly or by necessary implication. The powers vested in the state governments by their respective constitutions or remaining with the people of the several states, prior to the establishment of the constitution of the United States, continue unaltered and unimpaired, except so far as they are granted to the United States.^c This residuary sovereignty of the States is a restraint to the power of the Union or federal government, and renders it a limited government. Madison says, that the constitution is in strictness neither a national nor a federal government, but a composition of both, and in this sense it may be called a mixt government.^d

Here we must notice an inaccuracy of Story, in his chapter on the distribution of powers, which arises from his neglecting the distinction drawn by Pufendorf, between the form of the government and the mode of governing. Story commences that chapter thus: "In surveying the general structure of the constitution of the United States, we are naturally led to an examination of the fundamental principles on which it is organized, for the purpose of carrying into effect the objects disclosed in the preamble. Every government must include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all governments are supposed to rest, namely, the executive, the legislative, and the judicial powers. The manner and extent in which these

^a Chap. XXIV.

^b Pufend. *Droit des Gens*, liv. 7, ch. 6, § 7.

^c Kent, *Comm.* vol. 1, lect. 15, p. 313.

^d *Federalist*, num. 39, p. 207—209.

powers are exercised, and the functionaries in whom they are vested, constitute the great distinctions which are known in the forms of government. In absolute governments, the whole executive, legislative and judicial powers are, at least in their final result, exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him. If the same powers are exclusively confined to a few persons, constituting a permanent sovereign council, the government may be appropriately denominated an absolute or despotic aristocracy. If they are exercised by the people at large, in their original sovereign assemblies, the government is a pure and absolute democracy. But it is more common to find these powers divided and separately exercised by independent functionaries, the executive power by one department, the legislative by another, and the judicial by a third;—and in these cases, the government is properly a mixed one; a mixed monarchy, if the executive is hereditary in a single person; a mixed aristocracy, if it is hereditary in several chieftains or families; and a mixed democracy or republic, if it is delegated by election and is not hereditary. In mixed monarchies and aristocracies, some of the functionaries of the legislative and judicial powers are, or at least may be, hereditary. But in a representative republic, all power emanates from the people, and is exercised by their choice, and never extends beyond the lives of the individuals to whom it is entrusted. It may be entrusted for any shorter period, and then it returns to them again, to be delegated again by a new choice.”*

According to this doctrine, the constitution of the United States would be rendered a mixed government by the mere circumstance that the three departments of government are confided to separate functionaries. But these functionaries all exercise their duties as the delegated servants of one single power, the people, who are represented in their sovereign capacity by the legislative assembly or congress, to whom all are subordinate. And therefore but for the residuary sovereignty of the States, the government of the Union would be a simple or absolute democracy. Subject to this correction however, the doctrine of Story is important, as showing the division of the departments of government. For that division is grounded not only on the principle of division of labour, but also on reasons analogous to those on which real mixed constitutions are constructed. Thus Story says: “In the establishment of a free government, the division of the three great powers of government, the executive, the legislative, and the judicial, among different functionaries, has been a favourite theory with patriots and statesmen. It has by many been deemed a maxim

* Story, Comment. on the Constit. of the United States, vol. 2, pp. 1, 2.

of vital importance that these powers should be for ever kept separate and distinct. And accordingly we find it laid down with emphatic care in the bill of rights of several of the state constitutions. In the Constitution of Massachusetts, for example, it is declared, that 'in the government of this commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.' Other declarations of a similar character are to be found in the other state constitutions.*"

The delegation of two or more branches of government to one department would no doubt cause danger of encroachment and abuse of power, and might be hurtful to the stability of a republic, in which no functionary should have a preponderating influence; but the principles regarding the arrangement of departments are still distinguishable from those which regulate the balance of powers in a mixed government. Thus the law of the State of Massachusetts, just cited, differs from the English Constitution, in which the executive branch is also part of the legislative, and the legislative sometimes exercises judicial powers. The reason of this diversity is, that in the British Constitution there is not merely a separation of departments, but also a combination of monarchy, aristocracy, and democracy, so contrived that they may check and influence each other. These reflections show both the analogy and the diversities between the mere distribution of departments which may exist in simple monarchy, aristocracy or democracy, and the separation of the branches of the sovereign power in a mixed government, formed by combining two or all those forms of civil polity. We will now explain the reasons which recommend mixed governments, and the principles of Public Law on which they are constructed.

Regular or simple forms of government are no doubt the most obvious and easily understood; and they are characterized by unity and consistency. But, on the other hand, each of them has its own particular inconveniences, dangers and defects. Uncontrolled power is always liable to be misused, whether it be entrusted to one man, to a few, or to the people. And the peculiar nature and spirit of monarchy, aristocracy and democracy are remarkably apt to counteract the dangers and evil tendencies of each other. We have already observed, that the celebrated dispute on the question, what is the best form of civil polity, is useless, and impossible to be determined as a general proposition, for its solution depends, in each particular case, on a

* Story, *ibid*, p 3; *Federalist*, num. 47, p. 264.

variety of local circumstances. And this observation is particularly applicable to mixed governments. For there are countries where a simple form could not be adopted without excluding from the political system some essential part of the interests and powers which constitute society. The result must be uneasiness and insecurity, and, perhaps, revolutionary changes; because, as we have seen, civil society is natural society itself, modified by the creation of sovereignty and government;⁷ and therefore the system of government or polity of every state ought to be grounded on the elements of order and power which the particular natural society presents. So those who have attempted to adapt a society to a given form of polity, instead of framing the government in harmony with the condition of the society, have generally failed and injured the commonwealth. Thus, in the plan of human society traced by Domat, civil government is placed last, as being required to restrain every one within the order of those engagements which are peculiar to him. And for this government, he adds, God has established the powers necessary to maintain society.⁸ These reflections exemplify the connexion between Public Law and the science of Politics. The welfare of states depends, indeed, mainly on the laws by which society is constituted. We may conclude, that in some states a mixed is better than a simple form of government.

The observations on fundamental laws in the preceding chapter show that the power of a sovereign cannot be effectually limited, except by dividing and distributing the sovereign power. And this is so, whether the sovereign be a monarch, a senate, or a popular assembly. The purpose of such limitation is to obtain what is called a free government, and to secure liberty. This subject we must now briefly consider.

Absolute liberty, that is to say, the faculty of acting without any control whatever, according to the impulse of desire or inclination, is irreconcilable with the nature of man as a reasonable creature, to whom natural law has been given as a rule by God. This proposition is still more evidently true with respect to that portion of mankind who have received the true Religion, and are members of the true Church. Thus Suarez teaches us, that though a law taken absolutely is not necessary, yet, assuming the creation of reasonable creatures, a law is useful and necessary for their direction and government.⁹ And so the laws of man are the rules directing his conduct towards his end.¹⁰ It follows, that natural liberty, that is, the utmost liberty com-

⁷ Burlamaqui, *Droit des Gens*, tom. 4, par. 1, ch. 1, § 3, p. 15.

⁸ Domat, *Loix Civiles*, *Traité des Loix*, ch. 5, § 6.

⁹ Suarez, *De Legib.* lib. 1, cnp. 3, § 3.

¹⁰ Domat, *Loix Civiles*, *Traité des Loix*, ch. 1, § 3.

patible with the nature of man, is that which is restrained only by natural law and the laws of religion. Therefore natural liberty is not a state of entire independence. But natural law cannot be enforced and maintained in full vigour except in the social state. And the social state requires the institution of sovereign power adequate to govern the commonwealth, prescribing to its members certain laws or rules of conduct, and compelling them to conform thereto. And the liberty enjoyed in civil society must be the most perfect and secure, and best calculated for happiness, because the institution of government gives fresh vigour to natural law, and the establishment of a sovereign power provides effectually for its observance.^c

The establishment of sovereignty and government, it is true, modifies natural liberty considerably. Man, under those institutions, must renounce his supreme arbitrium over his person and actions, that is to say, his independence. But it is evident that nothing can be more desirable than to sacrifice a degree of liberty dangerous to possess, retaining only the freedom requisite for real and sound happiness.^d We have shown that the institution of civil society, constituted by the creation of sovereign power and government, does not spring from contract, but from the law of nature. From that law arises the duty of submitting to civil government, and obeying its laws, and not from any consent given by individuals to such submission and obedience, subject to certain conditions. How indeed can it be held that the law of nature is binding on mankind unless they are also under the obligation of adopting the only sufficient means whereby that law can be maintained? Men are evidently bound by natural law to live in the social state, which alone is adapted to their nature and their interests, physical, moral, and religious; and that state cannot exist without sovereignty and government, which are necessary to keep every one within his obligations and the order of the engagements which constitute society. The consent of men can add nothing essential to the force of obligations to obey civil authority, which spring from the nature given to mankind by the Creator. And the principle—that the obligation of obedience to the civil government on the part of the subject, and the duty of protection on the part of the state, are reciprocal—necessarily arises, not from contract and consent, but from the very nature of the obligatory force of the institution of civil government. For if the government entirely refuses to fulfil the purpose for which it is intended, its au-

^c See my Comment. on the Constit. Laws of England, p. 418, &c.

^d Cujacius, *Op.* tom. 7, col. 28, edit. Venet. Mutin. And see Pufend. *Droit des Gens*, liv. 2, ch. 1, § 2, &c.

thority necessarily ceases with the reasons of natural law on which that authority is founded, and it in truth ceases to be a government. And on the other hand, when the subject no longer pays due obedience to the civil power of government, he becomes an offender against the law, both natural and municipal, and an object, not of protection, but of punishment. These reasons, which necessarily contain some repetition of doctrines already explained, show in what sense the proposition is true, that man,* in civil society, gives up a part of his natural liberty for the purpose of enjoying and securing the remainder, with the other advantages of that institution. It is correct, provided we exclude the notion of contract, or of what Trebonian has named an obligation arising *quasi ex contractu*, that is to say, by implied consent. Civil liberty, then, is the natural liberty of man, deprived of that part which would constitute the independence of individuals, if they were not in civil society, by the authority given to the sovereign power, or power of civil government. We see here, as Burlamaqui observes, the absurdity of those who imagine that civil society is a wrongful encroachment on their natural liberty and independence, and government an invention to satisfy the ambition of some, at the expense of the rest of society.^f

There is a passage in Grotius where he says, that civil liberty excludes royalty, and every other domination properly called, as personal liberty excludes the power of a master. But, as Barbeyrac shows, the meaning of the passage is, that a body politic has not liberty where it is under the domination of a despotic power excluding it from self-government.^g In this sense civil liberty signifies the liberty of a commonwealth (*civitas*), and not that of a person living in a civil society, and in substance it is the same as self-government.

As natural liberty is liberty limited by the laws of nature and religion, so civil liberty (of persons) is that which is limited by municipal law, that is to say, by the law of the civil community. This agrees with the following celebrated definition given by Florentinus in the Pandects, which has frequently been misunderstood,—*Libertas est naturalis facultas, ejus quod cuique facere libet, nisi si quid vi aut jure prohibetur*.^h Florentinus defines liberty without reference to its extent or degree, and he therefore describes it as the natural faculty of exercising free will, which remains, after excluding those things in which free will is restrained, either by material obstacles, or by legal obliga-

* Blackst. Comm. b. 1, ch. 1, p. 125.

^f Burlamaqui, Droit des Gens, tom. 4, par. 1, ch. 3, § 12.

^g Grot. Droit de la Guerre, liv. 1, ch. 3, § 12, et not.

^h L. 4, ff. De Statu Hom.

tion.¹ This text shows the legal nature of liberty or freedom. It is not a creature of law, but a natural faculty which law restricts and qualifies. De Lolme furnishes a good illustration of this doctrine. He says that when he began to study the English Constitution he supposed that every article of liberty which the subject enjoys was grounded upon some positive law by which that liberty was insured to him. In regard to the liberty of the press—i.e. of writing and publishing—he had no doubt that it was so. But after some researches it occurred to him that the liberty of the press was grounded on its not being prohibited, and that this want of prohibition was the sole, and, at the same time, the solid foundation of it.² Such is the true meaning of this valuable text of the Pandects, which some writers have erroneously connected with the celebrated law *quod principi placuit*,³ and thus misunderstood it.

We must now proceed to consider the liberty of persons with reference to its degree or extent. Our investigations regarding the reasons of law show that municipal laws should all be founded on some reason which constitutes their justice; that is to say, either a rule of immutable law, or a relation to the order of society and the advantage of the community. And so it is that all laws are consequences, direct, or more or less indirect, of the two primary laws. It follows from these principles, and from the objects and grounds of civil governments, that the natural freedom of mankind should not be restrained by municipal laws beyond what is required, or at least useful, for the welfare of the community. This position is confirmed by considerations of policy and public economy. For men will obey the law more readily and contentedly when no unnecessary or useless restraints are cast upon them by the sovereign; and the tendency of useless laws is to cramp the development of men's faculties, or interfere with the free action and energy beneficial to industry, commerce, and the advancement of art and science.⁴ A consciousness of these principles causes governments to leave some laws unenforced, or allow them to become obsolete; and this course is next in wisdom to that of repealing useless or otherwise bad laws. Blackstone justly remarks that that system of laws is best calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.⁵ What

¹ See Cujacius, Op. tom. 7, col. 28; Comment. in Tit. Dig. De Just. et Jur. ad Leg. 4.

² De Lolme, Constitution of England, book 2, ch. 10, pp. 289, 290, note.

³ L. 1, ff. De Constit. Princip.

⁴ Mill, Polit. Econom. p. 510, &c.

⁵ Blackst. Com. b. 1, pp. 125, 126.

precise amount of liberty is compatible with the public welfare, and the attainment of all the objects of civil society, is a very extensive and important subject of inquiry, embracing almost every detail of government and legislation. It depends, in each state, on a great variety of circumstances, such as the nature of the government, the character of the people, and all those considerations which produce the diversity of municipal laws and institutions. These are, for the most part, matters of opinion, on which the judgments of men differ greatly, and difficult to bring within fixed principles of law or policy.

Government not limited, whether it be that of a monarchy, a senate, or a popular assembly, is liable to the danger that the sovereign may diminish the liberty of persons beyond those limits which we have just pointed out. And the balance of powers in a mixed government is intended chiefly to meet this danger, securing the people from encroachments on their liberty on the part of those to whom the sovereign power, or the administration of any portions thereof, is entrusted. This is accomplished by not clothing any one person or body in the community with the whole sovereign power, but distributing that power among the different orders and parts of the body politic, and modifying its exercise by restraints and limitations. And here we find political liberty exemplified. For the faculty of exercising freely the portion of this power, vested by law in each man, is properly called political, as contradistinguished from civil liberty, though the derivation of those two words is the same. Thus the freedom enjoyed by a man, of using and disposing of his property as he pleases, so far as the law allows, is part of his civil liberty; and the free enjoyment of the parliamentary or municipal franchise annexed to that property by the law, belongs to political liberty. And thus political liberty is the faculty of exercising political power according to law.* Here we see a distinction between both natural and civil liberty, and political liberty; for the latter is the creature of the municipal law, which grants it to the citizen for the benefit of the commonwealth, and not by reason of any inherent right of his own.

We must now proceed to consider the principles on which mixed governments are constructed.

In our examination of the connexion of the *jura majestatis*,^p or parts of the sovereign power with each other, we have seen the difficulty of separating them, without violating the fundamental principle of unity which is necessary to the existence of every body politic. No contract or convention can overcome this difficulty. It is only to be met by a combination of the separate powers of the state, so contrived as

* See my Commentaries on the Constitutional Law of England, p. 420.

^p Chap. XXII.

to make them balance and restrain each other, and thereby produce and preserve that common supreme will which is essential to the government of a commonwealth. This is necessary whenever the parts of the sovereign power are separated and distributed; and even when there is only a separation of departments, so that the legislative, executive and judicial powers are administered by different functionaries, the principle of unity should not be lost sight of. Thus this principle is insisted upon by writers on the constitution of the United States, where the sovereignty of the Union is vested in the people represented by the Congress, and the president is a responsible executive magistrate.

Montesquieu has taken the English Constitution as the great example of the doctrine that the three great powers of government ought to be separated, which is also a fundamental basis of the constitution of the United States, and of all the modern constitutions of limited monarchies in Europe, commonly described as constitutional monarchies. We will now consider his theory. "When in the same person or body the legislative is conjoined with the executive power, there is no liberty; for it may be feared that the same monarch or senate will make tyrannical laws, to execute them tyrannically."

"There is also no liberty if the power of judging (or judicial power) be not separated from the legislative and executive powers. If it be joined with the former, the power over the lives and liberty of the citizens will be arbitrary, for the judge will be legislator. If it were united with the latter, he might have the power of an oppressor."

"All would be lost, if the same man or the same body, whether of optimates or of the people, exercised those three powers, that of making laws, of executing public resolutions, and judging offences or the differences among citizens."

"In the greater number of the kingdoms of Europe, the government is moderate, because the prince, who has the two first powers, leaves to his subjects the exercise of the third. In Turkey, where the three are united in the Sultan, there is a dreadful despotism." . . .
 "The judicial power ought not to be given to a permanent senate, but should be exercised by persons taken from the body of the people, at certain times of the year, in a mode prescribed by law, in order to form a tribunal which shall only last so long as necessity requires."

"In this way the power of judging, so terrible among men, being attached neither to a certain class, nor to a certain profession, becomes, as it were, invisible and null. Men have not the judges continually before their eyes; and they fear the judicial office, but not the judge."

"In great accusations, the accused should choose his own judges

concurrently with the law, or at least he should be able to challenge such a number, that those who remain may be held as chosen by him."

"The other two powers might be given to magistrates or permanent bodies, because they are not exercised over any individual singly, being, one of them, the general will of the state; and the other, the execution of that general will."

"But though tribunals ought not to be fixed and permanent, their judgments ought to be so, to the extent of being no more than a precise text of law. If they were the individual opinion of the judge, men would be living in society without knowing precisely the engagements which they contract there."

"Judges should, indeed, be of the condition of the accused, or his peers, that he may not believe that he has fallen into the hands of men disposed to wrong him."

"If the legislative power allows the executive to imprison citizens able to give security for their conduct, there is no liberty, except where they are arrested to answer, without delay, to an accusation which the law has made capital; in which case they are in reality free, being subject only to the power of the law."

"But if the legislature thought itself endangered by some secret conspiracy against the state, or understanding with external enemies, it might for a short and limited period permit the executive to arrest suspected citizens, who would lose their liberty for a time, to secure it for ever. And this is the only reasonable way of supplying the place of the Ephori, and the Venetian inquisitors of state, who are also despotic."⁴

This celebrated essay gives the principles on which the separation of the three powers is grounded. The same reasoning is adopted by Blackstone, and used by Story. "In all tyrannical government," says the former, "the supreme magistracy, or the right both of making and of enforcing laws, is vested in the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the powers which he, as legislator, thinks proper to give himself. But where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject." Again, "In this distinct and separate existence of the

⁴ Montesquieu, *Esprit des Loix*, liv. 11, ch. 6.

judicial power in a peculiar body of men, nominated indeed by, but not removable at, the pleasure of the crown, consists one main preservative of the public liberty; which cannot long subsist in any state, unless the administration of common justice be in some degree separate from the legislative, and also the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."^r "And," continues Story, "the *Federalist* has with equal point and brevity remarked, that the accumulation of all powers, legislative, executive, and judicial, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny."^s

We have now to consider how the three divided departments of government, or the division and distribution of the sovereign power, may be made consistent with the great requisite of unity. Madison explains this in a masterly way, investigating the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. "The oracle," he says, "who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavour, in the first place, to ascertain his meaning on this point."

"The British constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. . . . That we may be sure then not to mistake his meaning in this case, let us recur to the source from which the maxim is drawn."

"On the slightest view of the British constitution we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns; which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are ap-

^r Story, *Comm. on the Constit. of the United States*, vol. 2, ch. 7, § 521, pp. 4, 5; Blackst. *Com.* vol. 1, pp. 146, 269; Woodeson, *Elem. of Jurisp.* 53, 56; Wilson, *Law Lect.* pp. 394, 399, 400, 407—409; Paley, *Moral Philos.* b. 6, ch. 8.

^s Story, *ubi sup.* § 522, and note 2; *Federalist*, num. 22, 47.

pointed by him, can be removed by him on the address of the two houses of parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief; as, on the other hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote."

"From these facts, by which Montesquieu was guided, it may be clearly inferred, that in saying '*there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates,*' or '*if the power of judging be not separated from the legislative and executive powers,*' he did not mean that these departments ought to have *no partial agency* in, or *no control* over, the acts of each other. His meaning, as his own words import, and still more conclusively illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides, cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock, nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act; though by the joint act of two of its branches, the judges may be removed from their offices; and though one of its branches is possessed of the judicial power in the last resort. The entire legislature again can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy; and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department."

¹ This last sentence is scarcely correctly expressed, for the judges only give their opinions to the House of Lords, and that only when their opinion is asked. See my Comment. on the Constit. Law of England, pp. 84, 85, and the authorities cited there.

"The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehension may arise lest the *same* monarch or senate should *enact* tyrannical laws, to execute them in a tyrannical manner.' Again, were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would then be the *legislator*. Were it joined to the executive power, the *judge* might behave with all the violence of an *oppressor*.' Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author."

Madison then proceeds to show, that though the separation of the three powers is laid down as an axiom in the constitutions of the several States of the Union, yet the several departments are not in any instance kept absolutely separate and distinct. In the constitution of New Hampshire, which was last formed, the doctrine is thus qualified. It is declared, "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of each other, *as the nature of a free government will admit; or as is consistent with that chain of connexion that binds the whole fabric of the constitution in one indissoluble bond of unity and amity*. We have seen that the principle of division is stated in an unqualified manner in the Constitution of Massachusetts. But even there a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body; and the senate, which is a part of the legislature, is a court of impeachment for members, both of the executive and judicial departments. The members of the judiciary again are appointable by the executive department, and removable by the same authority, on the address of the two branches of the legislature. Lastly, a number of officers of the government are annually appointed by the legislative department. As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have at least in this point violated the rule established by themselves. And so the constitutions of the other states, while adhering to the rule that the three powers of government ought to be separate, yet provide for the unity and harmony of the system by, in a greater or less degree, connecting those powers together by some participation in each other's functions." But Madi-

* Federalist, num. 47, p. 261—263; Story, Comm. on the Constitution of the United States, vol. 2, book 3, ch. 7, § 524.

* Federalist, *ibi*, p. 263—266.

son observes, that in some of those constitutions, the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation of the different powers; and in no instance has a competent provision been made for maintaining in practice the separation delineated on paper.⁷

The great difficulty is to provide sufficient means for preventing the encroachments of the three powers on each other, thereby securing to each its constitutional independence of action. No mere declaration on paper can effect this purpose.⁸ And indeed, as we have already observed,⁹ no ingenuity or wisdom in framing a constitution can secure it, without the practical good sense and moderation of the people themselves. Yet we shall see, in the next chapter, that the three departments of government may be so combined as to produce a balance of political power in the state. This object may be partly attained by mixed government, that is to say, by not merely dividing the departments of government among different functionaries, but separating the branches of the sovereign power itself, and giving them to different parts or orders of the state, and so combining together two, or all three of the simple forms of government—monarchy, aristocracy, and democracy.

This is the sort of polity referred to in the celebrated passage of Tacitus: *Cunctas nationes et urbes populus, aut priores, aut singuli regunt. Delecta ex his et constituta reipublicæ forma laudari facilius quam invenire, vel si evenit haud diuturna esse potest.*^b And Cicero says, *Statuo esse optime constitutam rempublicam, quæ ex tribus generibus illis, regali, optimo et populari, modice confusa.*^c Tacitus wrote before the invention of representative assemblies, and this may be one reason why he thought that a mixed government could scarcely be durable. Yet we must admit that our own country is the only existing instance of the long continued success of a constitution in which monarchy and democracy are combined with a hereditary, and therefore independent, senate of nobles; that is to say, a real, political aristocracy. And here even the democratic element has been gradually gaining ground on the two others, so as to bring the state more and more towards monarchical democracy, thereby exemplifying the opinion of Tacitus, that the three forms cannot long remain combined together. And so in France, the hereditary peerage established at the Restoration was soon abolished and converted into an upper chamber, composed chiefly of functionaries, and pensioners of the crown, and

⁷ Federalist, ibi, p. 267.

⁸ Story, ubi sup. § 529; Federalist, num. 48.

⁹ End of Chap. XXII. of these Commentaries.

^b Tacit. Ann. lib. 14.

^c Cicero, Fragm. de Repub.

friends of the minister, who could not accurately be called a political aristocracy, except in the sense of their holding office for life, and not representing the people.

Notwithstanding these difficulties, monarchy, aristocracy and democracy are admirably calculated to fulfil different parts in the constitution of a state, and to check what may be dangerous in each of them. The reasons which we have explained in favour of hereditary monarchy, show the adaptation of this institution to the headship and representation of a state, and the performance of executive functions which require unity, perpetuity, secrecy and vigour. And a perpetual hereditary chief magistrate, invested with the majesty of the regal office, is peculiarly qualified to check the pride and ambition of a nobility, and to give stability to the democratic part of the commonwealth, by raising the chief magistracy beyond the reach of powerful magnates and popular leaders. The last of these advantages, and that of perpetuity, are not obtained, and the others are secured in a lesser degree, when the monarchy is not hereditary. But here we must observe, that the person of the king must be sacred and inviolable, and he can be amenable to no court or authority, because if it were not so, he would cease to be one branch of the sovereign power, and become a mere functionary, like the president of the United States,⁴ and only a titular prince; and the state would be no longer a monarchy but a republic. And if he were accused or judged, his independence would be at an end and the balance of the constitution destroyed. Therefore, it is a maxim of the English constitution that *the king can do no wrong*. And whatever may be exceptionable in the conduct of public affairs is not to be imputed to the sovereign, who cannot be made personally responsible.* "If," says Blackstone (for example, "the two Houses of Parliament, or either of them, had avowedly a right to animadvert on the king or each other, or if the king had a right to animadvert on either of the Houses, that branch of the legislature so subject to animadversion would instantly cease to be a part of the supreme power; the balance of the constitution would be overturned; and that branch or branches in which this jurisdiction resided would be completely sovereign."[†] This doctrine is entirely in accordance with the principles of Public Law which we have seen while examining the sovereign power. For each branch of that power must partake of that character of sovereignty which consists of independence and supremacy in the exercise of its own proper functions.

Here we must remark, that under the restraints and safeguards

⁴ Kent, Com. vol. 1, lect. 13, p. 288.

* 1 Blackst. Com. c. 7, p. 245; Plowd. 487.

[†] 1 Blackst. Com. c. 7, p. 244.

of a limited or mixed constitution, one great objection to hereditary monarchy is removed or much diminished. For the devolution of the crown to a bad king is less dangerous or prejudicial in proportion as the power of the prince is restricted, and the system and business of government rendered independent of the court; and thus the advantages of hereditary monarchy are obtained, while its chief inconvenience is greatly diminished.

We come now to aristocracy in mixed governments. It is, in the first place, a most important support to monarchy against the encroachments of the democracy. And where this order exists in the social system of a state, they cannot, as Montesquieu remarks, be confounded among the people, and have their voice like all other citizens, otherwise the common liberty would be their slavery, and they would have no interest in defending it, as a great part of the measures would be directed against themselves. Their share in legislation should therefore be in proportion to the other advantages which they possess in the state; and this will be, if they constitute a body having a right to stop the encroachments of the people, as the people have a right to do to those of the nobles. Thus the legislative power will be confided both to the body of nobility and the representatives of the people, who will each have their separate assemblies and deliberations, and distinct views and interests.^a This body of nobles, continues the president, ought to be hereditary. It is, in the first place, so by its very nature, and besides, it ought to have a very great interest in preserving its privileges, in themselves invidious, and which in a free state must always be in danger.^b

If not hereditary, but appointed for life by the crown, it is a mere legislative council representing the opinions of successive administrations, and not one of the orders or estates of the commonwealth. Placed between the influence of the crown and the power of the people, such a senate, though it may be respectable, must soon become impotent. It can give no useful support to the crown, because it is a mere body of functionaries, every one of whom owes his seat to the favour of the court or a minister, and therefore identified with the executive. And the want of real power in such an assembly must have a tendency to render it a place of retirement for superannuated public servants and political mediocrities, or a means of satisfying vanity or rewarding subserviency. On the other hand, a hereditary peerage may devolve on an unworthy person; and this institution can scarcely exist unless the nobility, as a class, be at least on a par in worth, independence and

^a Montesq. *Esprit des Loix*, liv. 11, ch. 6; *Cœuvres*, tom. 1, p. 213; 1 Blackst. *Com.* ch. 2, pp. 157, 158.

^b Montesquieu, *ibid.*

intelligence with the superior classes of the rest of the community. It must also be recruited by the frequent addition to its ranks of men eminent for their great services, their ability, or their influence in the country, however humble may be their own extraction. Thus the body of the people will look without envy, or at least without animosity, on a dignity open to the ambition of every citizen; while the nobility will receive fresh vigour and lustre at every generation by the addition of new members raised by their merit, their services, their high offices, or their importance in the commonwealth. And unless the crown had the unrestricted privilege of making new peers, there would be no remedy against ambition, perverseness, or obstinacy on the part of the Upper House, who would become an exclusive class, too separate from the rest of the community to act in harmony with the popular branch of the legislature.¹

The senate or assembly of the aristocracy may be composed of representatives of the body; and so at Genoa and Venice the senate were elected by the nobles out of their own body. The representative principle may thus be applied to this part of a mixed government (as we see in the instance of the peers of Ireland and Scotland), without destroying the distinctive character of a political aristocracy, which consists in its being not a mere body of functionaries or titulars, but a high class or order in the social system of the state.

But if the whole of the nobility voted at the election of each member of the senate, this would frequently amount (especially if the electors were not so numerous as to prevent cabals and combinations, and comprise many shades and varieties of opinion) to the total exclusion of the party constituting the minority. Thus we see that no Scotch peer of decidedly liberal opinions would have any chance of being elected one of the sixteen representative peers.

The aristocratic order are naturally liable to be influenced by the crown and by their particular interests, and therefore, as Montesquieu observes, they should only have a negative voice in raising money, and not be allowed to originate measures of that sort.²

"The great," says Montesquieu, "are always exposed to envy: and if they were tried or judged like others by the people, they might be in danger, and would not enjoy the privilege of the least of the citizens—that of being amenable to their peers. The nobles must therefore be summoned, not before the ordinary tribunals of the

¹ Hallam, *Constit. Hist.* vol. 4, p. 54. Lord Sunderland persuaded George I. to consent to renounce his prerogative of making peers. But the bill, limiting the House of Lords, after the creation of a very few more, to its actual number, was rejected by the House of Commons.

² Montesquieu, *ubi sup.* p. 214.

nation, but before that part of the legislative body which consists of nobles."^k The privileges of the British peerage in this respect are by no means so extensive, being confined to cases of treason, misprision of treason and felony;^l and even in these cases it may be doubted whether a peer would suffer any disadvantage by being tried by a jury. Yet this privilege contributes to the dignity and independence of the Upper House of Parliament.

"It may happen," continues the same writer, "that some citizen may in public affairs violate the rights of the people, and commit crimes which the established magistrates would not or could not punish. But in general the legislative power cannot exercise judicial functions. Still less can it do so in this particular case, where it represents the party interested—the people. It can, therefore, be only the accuser. But before what court shall the representatives of the people accuse? Will they condescend to appear before the tribunals of the law, their inferiors, and composed of members who, belonging to the people like themselves, would be overawed and influenced by the authority of so great an accuser? No. To preserve the dignity of the people and the safety of individuals, the legislative assembly of the people must accuse before the legislative assembly of the nobles, which has neither the same interests nor the same passions."^m

This theory has been followed in the constitutions of modern Europe, and, by analogy to it, impeachments by the House of Representatives in the United States are tried by the senate.ⁿ

Another distinctive quality of aristocracy renders it useful in conjunction with a democracy. A body of nobles are naturally deliberate and cautious in their determinations, especially when their large possessions give them weighty interests in all that concerns the public welfare; and their dignity and high station render them less liable than others to be swayed by sudden impulses of public opinion and passion, and the gusts of changing popularity or odium. They are thereby admirably qualified to give stability to the public measures, and infuse patience (which is essential both to justice and wisdom) into the deliberations of the legislature. But, on the other hand, these very qualities may be pregnant with inconvenience or even danger, unless qualified by due regard to the emergencies and circumstances of the times and the deliberate judgment of the body of the nation.

^k Montesquieu, *ubi sup.* p. 217.

^l 3 Inst. 30; 2 Inst. 49; Com. Dig. *Parliament*, l. 16.

^m Montesquieu, *ibi*, pp. 217, 218.

ⁿ Story, *Comment. on the Constit. of the United States*, vol. 2, pp. 214, 279. It is the same in most of the Constitutions of the several States. *Federalist*, num. 47.

With respect to the democratic part of a mixed state, little need be added to what we have said in considering republics, for there is no defect in monarchy and aristocracy that democracy is not able to moderate or cure. If the people be wise and virtuous, and obedient to the laws of God and the Church, this is indeed the most valuable part of a mixed government, because it includes the broadest interests and the great bulk of society. It is so powerful that there must be a constant tendency to make the state more subject to its sway than is compatible with the nature of a mixed government. The observations in the next chapter, concerning the way in which the balance of power between the legislative, executive and judicial departments may be obtained, will further explain this important matter. Unless, however, the body of the nation use moderation, temper and practical wisdom, no government of this kind, however well adapted to the particular country, can subsist long without becoming a republic or a democratic monarchy, or falling into civil war, confusion and anarchy.

CHAPTER XXVI.

THE DISTRIBUTION AND BALANCE OF THE POWERS OF GOVERNMENT, AND THE MEANS OF MAINTAINING THAT BALANCE.

General Principles exemplified by English and American Constitutional Law—Comparison of the Three Branches of Government with reference to their relative Strength and means of Self-protection—Preponderative Power of the Legislative Branch, and difficulty of restraining it—Weakness of the Judicial Power—Appeals to the People in Convention suggested as a Remedy against the Encroachments of the Legislative Power—Inconveniences and insufficiency of this Remedy—The Constitutional Balance of Power explained—Doctrines of Madison, Story and Blackstone—Consideration of the Subject with reference to each of the Three Branches of Government—The Legislature—Use and Importance of dividing this Department—The *Negotie* of the President of the United States—Comparison of this Provision with the Legislative Prerogative of the Crown in England—Double Legislative Assemblies considered and compared with a single Assembly—Duration of Representative Assemblies—Executive Department—Its Unity—The Civil List—Responsibility of Ministers—The Judicial Department—Permanency of the Judges—Mode of appointing them—Connexion of the Judicial with the Executive and Legislative Departments—Trial by Jury.

WE have seen that the doctrine of the division of the legislative, executive and judicial departments, and even the division of the sovereign power itself, among different orders or estates of the body politic, do not imply the total separation of those departments or

branches of the sovereign authority. Such total separation would injure the principle of unity essential to every civil government. We have now to examine this problem of Public Law :—to determine how the legislative, executive, and judicial functions, though divided, may be so combined and adjusted, that each may retain the independence of action necessary for its office, and be protected from the encroachments of the others; and at the same time, they may exercise a check upon each other, and so produce the balance of political power, necessary to a mixed constitution, and beneficial even where there is only a division of departments among different functionaries. This object is effected partly by combining different departments, and partly by other means, calculated to prevent any one of them from overwhelming the others.

This proposition is laid down by Madison, that unless the three departments of government be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation essential to a free government can never in practice be maintained.* And this proposition he very elaborately examines and proves. "It is," he observes, "agreed on all sides, that the powers belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that, in reference to each other, neither of them ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers."† The difficulty is to provide some practical security for each against the invasions of the others. What that security ought to be, is the great problem to be solved.

The compilers of most of the American constitutions appear, as we are told by Madison, to have relied principally on defining, by written law, the boundaries of the departments in the constitution of the government. But experience has shown the insufficiency of this method. "And," continues the same writer, "the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."‡ They seem not to have sufficiently considered, that though in a government where numerous and extensive prerogatives are placed in the hands of a hereditary monarch, the executive may be regarded as a source of danger, and ought to be jealously watched; in a representative democracy, where the executive magistracy is carefully limited, both in the extent and duration of its power, this sort of danger is far less to be apprehended. And where the legislative power in such a democracy is exercised by an assembly

* Federalist, num. 48, p. 263.

† *Ibi*.

‡ *Ibi*; Story, Com. on the Const. of the United States, vol. 2, ch. 7, § 520.

having an influence over the people whom it represents, and sufficiently numerous to feel all the passions that actuate a multitude, yet not so numerous as to be unable to pursue its objects, and therefore exposed to the intrigues of the executive, the danger to be guarded against proceeds from the preponderating power of this department.¹

We have indeed seen, in examining the different parts of the sovereign power, that the legislative branch is in its very nature peculiarly difficult to keep within any practical limits. In the United States of America, the legislative power is partly vested in the States, and partly in the Union. Yet Story makes the following valuable reflexions on the danger of its encroaching on the other parts of the government, or on the liberties of the people.² He remarks that, in point of theory, it is almost impracticable, if not impossible, that each of the three departments should possess equally, and in the same degree, the means of self-protection; and that in point of fact, those means in the different departments are immeasurably disproportionate. "The judiciary," he continues, "is incomparably the weakest of either, and must for ever, in a considerable measure, be subject to the legislative power."³ And the latter has, and must have, a controlling influence over the executive power, since it holds, at its own command, all the resources by which a chief magistrate could make himself formidable. It possesses the power over the purse of the nation and the property of the people. It can grant or withhold supplies; it can levy or withdraw taxes; it can unnerve the power of the sword, by striking down the arm that wields it."

"De Lolme has said, with great emphasis—"It is, without doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can duly do by successive steps (I mean, subvert the laws), and through a longer or a shorter train of enterprizes, the latter does in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and if I may be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But here we must observe a difference between the legislative and executive powers. The latter may be confined, and even is more easily so, when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be

¹ *Federalist*, *ibid.*, p. 269.

² Story, *Comment. on the Constat.* of the United States, vol. 2, § 530, p. 14, &c.

³ See *Federalist*, num. 78.

divided.* The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked, with equal force and sagacity, that the legislative power is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and the dread of the royal prerogative, which was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined as it was with an hereditary authority, and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. The representatives of the people will watch with jealousy every encroachment of the executive magistrate, for it trenches upon their own authority. But who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves, as by others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power, and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate the multitude; yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is easy to see that the tendency to the usurpation of power is, if not constant, at least probable; and that it is against the enterprising ambition of this department, that the people may well indulge all their jealousy, and exhaust all their precautions.[†] There are many reasons which may be assigned for the engrossing influence of the legislative department. In the first place, its constitutional powers are more extensive, and less capable of being brought within precise limits, than those of either of the other departments. The bounds of the executive authority are easily marked out and defined. It reaches few objects, and those are known. It cannot transcend them without being brought in contact with the other departments. Laws may check and restrain, and bound its exercise. The same remarks apply with still greater force to the judiciary. The jurisdiction is, or may be, bounded to a few objects or persons; for, however general and unlimited, its operations are necessarily confined to the mere administration of private and public justice. It cannot punish without law. It cannot create controversies to act

* De Lolme, b. 2, ch. 3.

† Federalist, num. 48, 49.

upon. It can decide only upon rights and cases, as they are brought by others before it. It can do nothing for itself.⁷ It must do everything for others. It must obey the laws, and if it corruptly administers them, it is subjected to the power of impeachment. On the other hand, the legislative power, except in the few cases of constitutional prohibition, is unlimited. It is for ever varying its means and its ends. It governs the institutions and laws and public policy of the country. It regulates all its vast interests. It disposes of all its property. Look but at the exercise of two or three branches of its ordinary powers. It levies all taxes; it directs and appropriates all supplies; it gives the rules for the descent, distribution, and devise of all property held by individuals. It controls the sources and the resources of wealth. It changes at its will the whole fabric of the laws. It moulds at its pleasure almost all the institutions which give strength and comfort and dignity to society. In the next place, it is the direct, visible representative of the will of the people in all the changes of times and circumstances. It has the pride as well as the power of numbers.⁸ It is easily moved, and steadily moved by the strong impulses of popular feeling and popular odium. It obeys, without reluctance, the wishes and the will of the majority for the time being. The path to public favour lies open by such obedience; and it finds not only support, but impunity, in whatever measures the majority advises, even though they transcend the constitutional limits. It has no motive, therefore, to be jealous, or scrupulous in its own use of power; and it finds its ambition stimulated, and its arm strengthened, by the countenance and the courage of numbers. These views are not alone those of men who look with apprehension upon the fate of republics, but they are also freely admitted by some of the strongest advocates for popular rights, and the permanency of republican institutions.⁹ Our domestic history furnishes abundant examples to verify these suggestions.¹⁰ If, then, the legislative power possesses a decided preponderance of influence over either or both of the others, and if, in its own separate structure, it furnishes no effectual security for the others, or for its own abstinence from usurpations, it will not be sufficient to rely upon a mere constitutional division of the powers to insure our liberties.¹¹ What remedy,

⁷ And see the *Federalist*, num. 78.

⁸ "Numerous assemblies," says Mr. Turgot, "are swayed in their debates by the smallest motives."

⁹ See Mr. Jefferson's very striking remarks in his notes on Virginia, pp. 195—197, 248. In December 1776, and again June 1781, the legislature of Virginia, under a great pressure, were near passing an act appointing a dictator. B. 1, p. 207.

¹⁰ *Federalist*, num. 48, 49.

¹¹ See Jefferson's Notes on Virginia, p. 195—197.

then, can be proposed adequate for the exigency? It has been suggested that an appeal to the people, at stated times, might redress any inconveniences of this sort. But if these be frequent, it will have a tendency to lessen that respect for, and confidence in, the stability of our constitutions, which is so essential to their salutary influence. If it be true that all governments rest on opinion, it is no less true that the strength of opinion in each individual, and its practical influence on his conduct, depend much upon the number which he supposes to have entertained the same opinion.^d There is, too, no small danger in disturbing the public tranquillity by a frequent recurrence to questions respecting the fundamental principles of government.* Whoever has been present in any assembly, convened for such a purpose, must have perceived the great diversities of opinion upon the most vital questions; and the extreme difficulty in bringing a majority to concur in the long-sighted wisdom of the soundest provisions. Temporary feelings and excitements, popular prejudices, an ardent love of theory, an enthusiastic temperament, inexperience, and ignorance, as well as preconceived opinions, operate wonderfully to blind the judgment and seduce the understanding. It will probably be found, in the history of most conventions of this sort, that the best and soundest parts of the constitution—those which give it permanent value, as well as safe and steady operation—are precisely those which have enjoyed the least of the public favour at the moment, or were least estimated by the framers. A lucky hit or a strong figure has not unfrequently overturned the best reasoned plan. Thus Dr. Franklin's remark, that a legislature with two branches was a wagon, drawn by a horse before, and a horse behind, in opposite directions, is understood to have been decisive in inducing Pennsylvania, in her original constitution, to invest all the legislative power in a single body.^f In her present constitution that error has been fortunately corrected. It is not believed that the clause in the constitution of Vermont, providing for a septennial council of censors to inquire into the infractions of her constitution during the last septenary, and to recommend suitable measures to the legislature, and to call, if they see fit, a convention to amend the constitution, has been of any practical advantage in that state, in securing it against legislative or other usurpations, beyond the security possessed by other states having no such provision.^g On the other hand, if an appeal to

^d Federalist, num 48.

^e *Ibi*, num. 48, 50.

^f Adams, *American Constitution*, 105, 106.

^g The history of the former constitution of Pennsylvania, and the report of its council of censors, shows the little value of provisions of this sort in a strong light. *Federalist*, num. 48, 50.

the people, or a convention, is to be called only at great distances of time, it will afford no redress for the most pressing mischiefs. And if the measures, which are supposed to be infractions of the constitution, enjoy popular favour, or combine extensive private interests, or have taken root in the habit of the government, it is obvious that the chances of any effectual redress will be essentially diminished.^b But a more conclusive objection is, that the decisions upon all such appeals would not answer the purpose of maintaining or restoring the constitutional equilibrium of the government. The remarks of the *Federalist* on this subject are so striking that they scarcely admit of abridgement without impairing their force:—‘We have seen that the tendency of republican governments is to aggrandizement of the legislature at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments. But, whether made by one or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter, by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their professions. The former are generally objects of jealousy; and their administration is always liable to be discoloured and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connexions of blood, of friendship, and of acquaintance, embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal weight with the people, and that they are more immediately the confidential guardians of their rights and liberties. With these advantages it can hardly be supposed that the adverse party would have an equal chance of a favourable issue. But the legislative party would not only be able to plead their case most successfully with the people; they would probably be constituted themselves the judges. The same influence which had gained them an election into the legislature would gain them a seat in the convention. If this should not be the case with all, it would probably be the case with many, and pretty certainly with those leading characters on whom everything depends* in such bodies. The conventions, in short, would be composed chiefly of men who had been, or who actually were, or who expected to be, members of the department, whose conduct was arraigned. They would consequently be parties to the very question to be decided by them.’^c

^b *Federalist*, num. 50.

^c *Federalist*, num. 49. The truth of this reasoning, as well as the utter inefficiency

If, then, occasional or periodical appeals to the people would not afford a sufficient protection against encroachments of the legislature on the other departments of the government, it is manifest that resort must be had to such a construction of the government as shall, by mutual checks of one department upon another, preserve their constitutional power and functions in relation to each other. And we must further observe, that the appeals to the people in convention, mentioned by the *Federalist* and Story, though practicable in a republic, would be dangerous, and perhaps fatal, in a constitutional monarchy.

It is evident, in the first place, that the very doctrine of the separation of departments requires that each department should have a will of its own. And therefore, they should be so constituted that the members of each should have as little agency as possible in the appointment of the others. But it might be inexpedient to insist rigorously on this last rule with regard to the judicial department, because there the primary consideration ought to be to select that mode of choice which best secures the requisite qualifications in the persons to be appointed; and the permanent tenure by which the offices are held in that department must soon destroy the sense of dependence on the authority conferring them.¹ It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments of office. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.²

But the great security for the constitutional division of the departments consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. Thus, ambition would be made to counteract ambition; the desire of power to check power; and the pressure of interest to balance an opposing interest. The policy of supplying by opposite and rival interests the defect of better motives in men, might be traced through the whole system of human affairs, private as well as public. We see it especially in all the subordinate distributions of power, where the constant aim is to divide and arrange the several officers in such a manner as that each may be a check on the other.³

of any such periodical conventions, is abundantly established by the history of Pennsylvania under her former constitution. *Federalist*, num. 50. See 2 Pitkin's Hist. pp. 305, 306.

¹ *Federalist*, num. 51, p. 280.

² *Ibid.*

³ *Ibid.*, p. 281.

"There seems," says Story, "no adequate method of producing this result, but by a partial participation of each in the power of the other; and by introducing into every operation of the government, in all its branches, a system of checks and balances, on which the safety of free institutions has ever been found essentially to depend. Thus, for instance, a guard against rashness and violence in legislation has often been formed by distributing the power among different branches, each having a negative check upon the other. A guard against the inroads of the legislative power upon the executive has been, in like manner, applied, by giving the latter a qualified negative upon the former; and a guard against executive influence and patronage, or unlawful exercise of authority, by requiring the concurrence of a select council, or a branch of the legislature, in appointments to office, and in the discharge of other high functions, as well as by placing the command of the revenue in other hands."^a

"The usual guard applied for the security of the judicial department has been in the tenure of office of the judges, who are to hold office during good behaviour. But this is obviously an inadequate provision, while the legislature is entrusted with a complete power over the salaries of the judges, and over the jurisdiction of the courts, so that they can alter or diminish them at pleasure. Indeed, the judiciary is naturally, and almost necessarily, as has been already said, the weakest department." It would seem, therefore, that some additional guards would, under such circumstances, be necessary to protect this department from the absolute dominion of the others. Yet rarely have any such guards been applied, and every attempt to introduce them has been resisted with a pertinacity which demonstrates how slow popular leaders are to introduce checks upon their own power, and how slow the people are to believe that the judiciary is the real bulwark of their liberties. In some of the states the judicial department is partially combined with some branches of the executive and legislative departments; and it is believed, that in those cases, it has been found no unimportant auxiliary in preserving a wholesome vigour in the laws, as well as a wholesome administration of public justice."^b

The danger of this combination of the judicial with some branches of the executive and legislative departments is, that it has a tendency to bring the judges within the sphere of political and party influences; but we must admit the force of the observations of Story on the insuf-

^a Story, Comment. vol. 2, ch. 7, § 540.

^b Montesq. *Esprit des Loix*, liv. 11, ch. 6; *Federalist*, num. 78, pp. 419, 420; num. 79.

^c Story, *ibid*, § 541.

ficiency of the protection which mere permanency of office gives to the judicial department.

Having seen the opinions of Madison and Story on the way of keeping the three departments of government in their due places, it will be interesting to turn to the doctrine of Blackstone on the same subject, thus juxtaposing the words of the great republican jurists to those of our own most eminent constitutional writer. After laying it down that the king's majesty and the three estates of the kingdom, the lords spiritual, the lords temporal, and the commons, are the constituent parts of the parliament, and that the crown and these three estates together form the great corporation or body politic of the kingdom,* (of which the king is said to be *caput, principium et finis*, because, unless he meets them, either in person or by representation, on their coming together, there can be no beginning of a parliament,† and he alone has the power of dissolving them,) Blackstone continues thus:—"It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner with the royal concurrence, redressed many heavy grievances, and established many salutary laws: but when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration, and, in consequence of these united powers, overturned both Church and State, and established a worse oppression than any they pretended to remedy. To hinder, therefore, any such encroachments, the king is himself a part of the parliament; and this is the reason of his being so. Very properly, therefore, the share of legislation which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*, this being sufficient to answer the end proposed. For we may apply to the royal negative in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but merely of *preventing* wrong from being done.‡ The crown cannot begin of itself any alterations in the present

* 4 Inst. 2; stat. Eliz. c. 3; Hale, Of Parl. 1.

† 4 Inst. 6.

‡ *Sulla—tribunus plebis sua lege injurie faciendæ potestatem ademît, auxilii ferendi reliquit.* De Leg. 3, 9.

established law, but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative, therefore, cannot abridge the executive power of any rights which it now has by law, without its own consent, since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein, indeed, consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. In the legislature the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved; while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct, not indeed of the king, which would destroy his constitutional independence, but, which is more beneficial to the public, of his evil and pernicious counsellors. Thus, every branch of our civil polity supports and is supported, regulates and is regulated, by the rest; for the two houses, naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together, by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but, at the same time, in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community."*

In this masterly sketch we see that the English constitution presents not only the mutual checks of departments on each other, but also that balance which arises from the combination of monarchy, aristocracy, and democracy, in one government. No law can be made without the concurrence of those three powers. And on the other hand, the commons have the chief control of the public revenue and supplies, while the crown, the supreme executive magistrate, is also the fountain of justice, the source of all judicial power in the state; and that branch of the legislature which constitutes the aristocratic part of this mixed government, is also the court for the trial of impeachments, and the supreme court of appeal. But the house of commons, though it is the grand inquest of the nation, is so far excluded from the exercise of judicial power in the ordinary adminis-

* Stat. 12 Car. II. c. 30.

* 1 Blackst. Com. ch. 2, pp. 154, 155.

tration of justice, that that assembly have never claimed, much less exercised, the right of administering an oath to witnesses, not even in cases of privilege, or of controverted elections, where their right of judicature was acknowledged, and on questions upon which they were admitted to be the sole court competent to determine.* And this power of administering an oath is exercised in election proceedings only by virtue of a particular act of parliament, for the trial of controverted elections, under which the House of Commons act as a court administering the statute law.[†] Thus the commons, the most powerful branch of the legislature, are restrained from the exercise of the judicial power, except where it is necessary for their own independence; while the constitution entrusts the judicial department to the crown and the lords. But though the crown is the fountain of justice, the royal prerogative cannot, except by authority of parliament, erect or empower any court to proceed otherwise than according to the forms and principles of the common law.[‡] And the sovereign cannot administer justice, except by the mouth of the judges, or by the advice of one of the constitutional councils of the crown.[§]

Having now shown the general principles of that adjustment and combination by which the due separation and balance of the three powers or departments of government are preserved, we must proceed to the further consideration of the same subject, with more immediate reference to each of those departments. And we will commence with the legislative, as the most important of the three.

Madison observes that the remedy for the preponderance of the legislative authority in republics is to divide the legislature into different branches, and to render them, by different modes of election, and different principles of action, as little connected with each other as the nature of their common functions, and their common dependence on society, will admit.^b And De Lolme has truly said, that the executive power may be confined, and even is, more easily so, when undivided, but the legislative, on the contrary, in order to its being restrained, should absolutely be divided.^c The reason of this diversity may be that the executive power can be restrained by laws, but the checks

* Hatsell, *Preced.* vol. 2, p. 158.

† *May, Priv. of Parl.* pp. 345, 363.

‡ See my *Comment. on the Const. Law of England*, p. 170—172; *Hob.* 63; 12 *Co. Rep.* 114; 1 *Woodes.* 188—190; *stat.* 53 *Geo.* 111. c. 24; *Com. Dig.* tit. *Prerogative*, D. 28; tit. *Chancery*, A. 3.

§ *Com. Dig.* tit. *Courts*, A; *Portesc. De Laudibus*, by Amon, ch. 8, n. B.

^b *Federalist*, num. 51, p. 281.

^c *De Lolme*, b. 2, ch. 3.

and restraints on the legislative must come chiefly from itself and its own construction, because it can make and repeal laws. So we have seen that in the English constitution the executive magistrate is protected from encroachments of the legislature by being made an essential part of parliament. And in that assembly monarchy, aristocracy, and democracy, mutually check each other, though, it must be admitted, with very unequal power.

In the constitution of the United States all legislative powers thereby granted are vested in the Congress, which consists of a senate and house of representatives.^d The president, therefore, is not part of the legislature, though he has a qualified negative upon its acts. But the principle of this provision is the same as that which, in our own country, makes the crown one of the three estates constituting the parliament. And it seems better calculated to be useful and practically effectual in a republic than an absolute veto would be. "An absolute negative on the legislature appears," says Madison, "at first view, to be the natural defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions it might not be exercised with the requisite firmness, and on extraordinary occasions it might be perfidiously abused."^e Therefore the constitution provides that if the president disapproves of a bill that has passed the Congress, he may return it, with his objections, to the house in which it originated, and that house enters the objections at large on their Journals, and proceeds to reconsider the bill. If, after such re-consideration, two-thirds of the house should agree to pass the bill, it is sent, together with the objections, to the other house, by which it is likewise reconsidered, and, if approved by two-thirds of that house, it becomes law. But in all such cases the votes of both houses are determined by yeas and nays, and the names of the persons voting for and against the bill are entered on the Journals.^f Kent observes that this qualified negative answers all the salutary purposes of an absolute one, and it is not to be presumed that two-thirds of both houses of Congress, on reconsideration, with the reasoning of the president in opposition to the bill spread at large upon their Journals, will ever concur in any unconstitutional measure. "In the English constitution," he continues, "the king has an absolute negative; but it has not been necessary to exercise it since the reign of William III. The influence of the crown has been exerted in a more gentle manner, to destroy any obnoxious measure in its progress through the two houses of

^d Constitution of the United States, art. 1, sect. 1.

^e Federalist, num. 51, p. 282.

^f Kent, Comment. vol. 1, lect. 11, p. 239.

Parliament."² Story, however, conjectures that the fact that this negative of the crown has not been exercised since 1692 may be attributed either to the reason given by Kent, or to the danger of exercising it, except in the most pressing emergencies; and he even suggests the question whether a qualified negative may not hereafter, in England, become a more efficient protection to the crown, than an absolute negative, which makes no appeal to the other legislative bodies, and consequently compels the crown to bear the exclusive odium of a rejection.³

The operation of parliamentary government, by means of responsible ministers, has also mainly contributed to render the exercise of this power unnecessary, except in some rare emergency. And the House of Lords will generally support the prerogative of the crown, by rejecting a measure repugnant to the sovereign: and a knowledge of this may enable the minister to defeat it in the House of Commons, a result which the constitutional influence of the crown and the House of Lords in the lower house may assist in producing, so as to avoid a collision between the branches of the legislature.⁴

In the United States, the legislature is, as we have seen, divided into two assemblies, the Senate and the House of Representatives, and in our own country it is divided into three branches, the crown and two separate assemblies. We have now to consider the reasons of Public Law, on which the institution of double legislative assemblies is grounded. This subject is exhausted by the American constitutional writers, the *Federalist*, Kent, Adams and Story, and they are unanimously in favour of two houses or chambers.

"One great object," says Chancellor Kent, "of the separation of the legislature into two houses, acting separately, and with co-ordinate powers, is to destroy the evil effects of sudden and strong excitement, and of precipitate measures, springing from passion, caprice, prejudice, personal influence and party intrigue, which have been found by sad experience to exercise a potent and dangerous sway in single assemblies. A hasty decision is not so likely to arrive to the solemnities of a law, when it is to be arrested in its course, and made to undergo the deliberation and probably the jealous and critical revision of another and a rival body of men, sitting in a different place, and under better advantages to avoid the prepossessions and correct the errors of the other branch. The legislatures of the Pennsylvania and Georgia consisted originally of a single house. The instability and passion which marked their proceedings were very visible at the time, and the subject

² Kent, *Comment.* vol. 1, lect. 11, pp. 140, 141.

³ Story, *Comment.* vol. 2, ch. 13, § 879; *Federalist*, num. 51, 73.

⁴ See my *Comment.* on the *Constit. Law of England*, p. 165.

of much public animadversion; and in the subsequent reform of their constitutions, the people were so sensible of this defect, and of the inconvenience they had suffered from it, that in both states a senate was introduced. No portion of the political history of mankind is more full of instructive lessons on this subject, or contains more striking proof of faction, instability, and misery of states, under the dominion of a single unchecked assembly, than that of the Italian republics of the middle ages; and which arose in great numbers, and with dazzling but transient splendour, in the interval between the fall of the western and the eastern empire of the Romans. They were all alike ill constituted, with a single unbalanced assembly. They were alike miserable, and all ended in similar disgrace."^k

About the commencement of the French revolution, many speculative writers were struck with the simplicity of a legislature with a single assembly, and concluded that more than one house was useless and expensive. Milton, Turgot, Franklin and Mackintosh, are but few of those who have professedly entertained and discussed the question.^l The elder President Adams, in his great work entitled "A Defence of the Constitutions of Government of the United States," vindicates the necessity of the division of the legislature into two assemblies. And Mr. Hamilton argues in the *Federalist*, that the organization of Congress under the confederation which vested the whole legislative power of the Union in a single assembly, was improper for the exercise of those powers which were to be necessarily deposited in the Union by the constitution. "A single assembly," he says, "may be a proper receptacle of those slender, or rather fettered, authorities which have been heretofore delegated to the federal head; but it would be inconsistent with all the principles of good government to entrust it with those additional powers, which the more moderate and rational adversaries of the proposed constitution admit ought to reside in the United States."^m

The doctrine of a single house of legislature was adopted in the French constitution of 1791. The very nature of things, said the politicians of the national assembly, was adverse to every division of the legislative body; and as the nation which was represented was one, so the representative body ought to be one also. The will of the nation was indivisible, and so ought to be the voice that pronounced it. If there were two chambers, with a *veto* upon the acts of each other, in some cases they would be reduced to perfect inaction. By

^k Kent, Comment. vol. 1, lect. 11, pp. 121, 122; and see pp. 226, 227; Adams, Defence of the American Constit. vol. 3, p. 502.

^l Story, Comment. vol. 2, ch. 8, § 548.

^m *Federalist*, num. 22, p. 19.

this reasoning, the national assembly was induced to reject the proposal of constituting an upper house. A single assembly was likewise established in the plan of government published by the French Convention in 1793. And Kent observes, that the instability and violent measures of that Convention tended to display the miseries of a single unchecked legislative assembly. He gives his opinion that, if the proposition of Lally Tolendal, to constitute a senate or upper house, composed of members chosen for life, had prevailed, the constitution would have had much more stability, and would probably have been much better able to preserve the nation in order and tranquillity; and, he adds, that their own sufferings taught the French people to listen to wisdom and experience. No people, said Boissy D'Anglas, in 1795, can testify to the world, with more truth and sincerity than the French can do, the dangers inherent in a single legislative assembly, and the point to which factions may mislead an assembly, without reins or counterpoise. We accordingly find that, in the constitution of 1795, there was a division of the legislature, and a council of ancients was introduced to give stability and moderation to the government.^a Chancellor Kent concludes by saying, that this idea was never afterwards abandoned. And yet, as if to show that nations profit little by experience, the same crude and shallow arguments, used in the national assembly in 1791, were repeated in 1848; and the French republic was constituted with a single legislative assembly. The absurdity and disgrace of that body, and the utter failure of the republic, add confirmation to the opinion of Kent, President Adams and Story.

We must now proceed to another mode of moderating the power of legislative assemblies. We have seen that the branches of the legislature should be rendered by different modes of election or appointment, and different principles of action, sufficiently unconnected with and independent of each other to act as a mutual check.^b Thus in our own country we have a hereditary prince and Upper House, and an elected House of Commons. So, in the United States, the House of Representatives is chosen biennially by the people, and the senate is elected by the legislatures of the different States, and one-third of the senators are elected in every second year.^c The principles of a republic require that both branches of the legislature should be elected directly or indirectly by the people; and the tenure of a seat in the legislature for life seems inconsistent with a democracy. But even in a mixed monarchy it is necessary that the members of one at least of

^a Kent, Comment. vol. 2, lect. 11, pp. 222, 223.

^b Federalist, num. 51, p. 281.

^c Kent, Com. vol. 1, lect. 11, p. 224—228.

the legislative assemblies should not hold their seats permanently for life, but be subject to re-election, and so brought under the control of the public judgment of the nation.¹ On this point Chancellor Kent gives us the following sound doctrines of Public Law:—"The term for which a representative is to serve ought not to be so short as to prevent him from obtaining a comprehensive acquaintance with the business to which he is deputed; nor so long as to make him forget the transitory nature of his seat, and his state of dependence on the approbation of his constituents. It ought also to be considered as a fact deeply interesting to the character and utility of representative republics, that very frequent elections have a tendency to render the office less important than it ought to be deemed, and the people inattentive in the exercise of their right, or else to nourish restlessness, instability and factions; whilst, on the other hand, long intervals between the elections are apt to make them produce too much excitement, and consequently to render the periods of their return a time of too much competition and conflict for the public tranquillity."² The prerogative of the crown in mixed monarchies, to dissolve the legislative body at any time, and send the representatives of the people to their constituents, is necessary to protect the royal authority from the power of parliamentary parties and factions, and give it a due influence in the legislature. And the fact that every representative must at certain periods either surrender his trust altogether, or give an account of his public conduct in parliament and solicit re-election, is an essential restraint upon those who would otherwise pursue their own private views and interest at the expense of the liberty and welfare of the people, and exercise their power in an arbitrary manner. It is impossible to lay down any universal rule determining how frequent elections should be. This in every country is matter of arbitrary law depending on a great variety of circumstances.³ We have, therefore, given only the general principles by which this important matter of constitutional law is governed.

We will now proceed from the legislative to the executive department. The essential character of this department is unity; for, as Chancellor Kent says, "the characteristic qualities required in the executive department are promptitude, decision and force; and these qualities are most likely to exist when the executive authority is limited to a single person, moving by the unity of a single will."⁴ This principle is carried into effect where, in a republic, the executive

¹ Blackst. Com. vol. 1, pp. 188, 189; Montesq. *Esprit des Loix*, liv. 11, ch. 6.

² Kent, Com. vol. 1, lect. 11, p. 229; Story, Comment. vol. 2, § 586, 587.

³ See Story, *ibid*, § 589. And see Hallam, *Constit. Hist.* vol. 4, pp. 52, 53.

⁴ Kent, Com. vol. 1, lect. 13, pp. 271, 272. And see the *Federalist*, num. 70.

department is entrusted to a single responsible magistrate not subject to the control of councillors.^a Under a mixed monarchy, where the king acts by the advice of responsible ministers, it is maintained on a somewhat qualified form by the unity of the regal office.^a In both cases the executive department cannot be divided into branches without injuring its useful efficiency. Its powers and functions should be united and defined by laws, the interpretation of which is committed to the judicial department. But those laws should not deprive the executive of that extent of discretionary power which the public service may require. Thus the prerogative of the crown is defined by Lord Mansfield to be "a discretionary power lodged in the crown for the common benefit of the kingdom and the king's subjects;" and Locke and Blackstone hold that it consists in the discretionary power of acting for the public good, where positive laws are silent.⁷ But this discretionary power of the executive department is subject to an indirect restraint wherever it cannot be effectually exerted without pecuniary supplies, which can neither be raised nor applied, except by the authority of the legislature.⁸ If this were not so, the executive would be enabled to encroach on the legislative branch of government.

On the other hand, the executive department could not preserve its due independence and energy if a permanent provision were not made for its support and sustenance. Blackstone, after some reflections on the diminution of the royal power and the impoverishment of the crown, stripped of the greater part of its hereditary revenues, suggests that it may be thought that the executive magistrate has neither independence nor power enough left to form a check on the lords and commons. But he considers that the permanent endowment called the Civil List, which is settled on every king by the first parliament after his accession, restores to him that constitutional independence which on his ascending the throne must be owned to be wanting.^a The same principle is followed in the United States of America, where a provision in the constitution declares that the president shall at stated times receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that time any other emolument from the United States, or any of them.^b

^a Federalist, *ibid.*, p. 370.

⁷ Blackst. Com. vol. 1, ch. 7, pp. 249, 250.

⁸ See my Comment. on the Constit. Law of England, p. 493; Locke on Gov. vol. 2, § 166; Blackst. Com. vol. 1, ch. 7, p. 252.

^a De Lolme, b. 1, ch. 6.

^a Blackst. Com. vol. 1, ch. 8, pp. 334, 335.

^b Kent, Com. vol. 1, lect. 13, pp. 280, 281.

In a republic the chief executive magistrate may also be restrained from encroaching on the other departments, by the limited duration of his office, and by responsibility. Thus the President of the United States holds office for four years. He is re-eligible for successive terms, but in practice no president has ever consented to be a candidate for a third election.^c And as in a republic every magistrate ought to be personally responsible for his behaviour in office,^d the president is directly amenable by law for maladministration.^e And this responsibility would perhaps suffice to prevent his disturbing the balance of power by enterprizes or encroachments on the other departments of government.

In a monarchy, however, this responsibility of the chief magistrate cannot be admitted without subverting the fundamental principle of mixed monarchical government, which, as we have seen, makes the Prince a part of the supreme power, and consequently amenable to no human jurisdiction.^f Therefore it is wise, under that form of government, to annex to the king a constitutional council responsible to the nation for the advice that they give. Without this, there would be no responsibility in the executive department—an idea inadmissible in a free government. But even there the king is not bound by the advice of his ministers, though they are answerable for such advice.^g He is the master of his own conduct in office, and may change his advisers whenever he thinks fit: though, on the other hand, as the ministers of the crown are obliged to give an account in parliament of the measures of the government, they cannot remain in office unless they have the confidence of that assembly. If a ministry retain office after they have ceased to be supported by a majority of the House of Commons (which, as representing the body of the nation, and having the chief control over the public resources, must naturally possess the greatest power over the state administration), some vote will follow, either directly or impliedly, censuring them, and perhaps an address to the crown praying their removal; and the next step will be a refusal of the supplies. The defeated ministers may however advise the crown to dissolve parliament, and thereby appeal to the country; but the decision on that appeal should be final.

Thus, both in a republic and in a mixed monarchy, though the executive and the legislative departments are divided from each other, the legislative assembly or assemblies may exercise a control over even

^c Kent, Com. vol. 1, lect. 13, p. 280.

^d Federalist, num. 70, p. 384.

^e Kent, Com. vol. 1, lect. 13, pp. 288, 289.

^f Blackst. Com. vol. 1, ch. 7, pp. 241, 245.

^g Federalist, ubi sup. p. 384.

that part of the executive administration which is discretionary and not defined by law, without depriving that department of its constitutional freedom of action. And so the legislative and executive branches of the sovereign power are prevented from clashing, by a mutual control which keeps each in its proper place, and maintains a unity in their action.

And here the reader must be reminded, that though this country cannot be taxed except by authority of parliament, which also appropriates the supplies to each service, the management and application of the public revenue is entrusted to the crown. And indeed the House of Commons will receive no petition for any sum of money relating to the public service but what is recommended by the crown.^b This is necessary to prevent the Houses of Parliament from drawing to themselves what essentially belongs to the executive branch of the sovereign power, and thus destroying the distribution of powers which constitutes the balance of the constitution.

We have now to examine how the judicial department is subjected to wholesome restraint, and protected against the encroachments of the other two. We have already seen that this is the weakest of the three departments; yet its due administration is necessary for the maintenance of the laws upon which the whole system of the state and of civil society depend. And so it has been declared by high authority, that without justice there can be no commonwealth, and that justice is the end of government.^c This doctrine, indeed, is matter of immutable law, a direct consequence of the two fundamental laws on which human society is constructed, though it must be confessed that in all countries there are many things in the municipal laws very different from the spirit of those two Divine laws.

In monarchical governments the independence of the judicial office is essential to guard the rights of the subject from arbitrary or undue exercise of the power of the crown: but in republics it is equally salutary to protect the constitution and laws from the encroachments and the tyranny of faction,^d and from arbitrary acts of the executive. It is necessary (as we have already observed) for that independence, that the tenure of judicial office should be permanent and its emoluments secure. The judges should, therefore, hold office for life, subject to removal only in case of misconduct; and their salaries

^b Hartsell, *Preced.* vol. 3, p. 194—196; May, *Law of Parl.* p. 335. See the subject of Supply further explained in my *Comment. on the Constit. Law of England*, pp. 204, 205.

^c *Div. August. De Civ. Dei*, lib. 19, cap. 21; *Federalist*, num. 51, p. 283.

^d *Kent, Com.* vol. 1, lect. 14, pp. 293, 294.

should depend upon no annual vote, but be settled and secured by a permanent law.¹ The power to remove a judge from office should be placed in hands worthy of so great a trust. Thus in our own country the concurrence of the crown and both Houses of Parliament is required for this purpose: and by the constitution of the United States the judges can only be removed by impeachment of the House of Representatives and judgment of the senate.²

The mode of appointing the judges is very important with reference to the independence of the judicial department and its due weight in the constitution. Kent shows, that even in a democracy, the judges ought not to be elected by the people. The fittest men, he observes, would probably have too much reservedness of manners and severity of morals to secure an election resting on universal suffrage. Nor can the mode of appointment by a large deliberative assembly be entitled to unqualified approbation. There are, he adds, too many occasions and too much temptation for intrigue, party prejudice, and local interests, to permit such a body of men to act, in respect of such appointments, with sufficiently single and steady regard to the general welfare.³ And a judge so appointed would constantly be suspected of remempering in the discharge of his duties the votes given for or against him, and the influences used at his election. The constitution of the United States has wisely entrusted the appointment of the judges to the president, with the advice and consent of the senate.⁴ That connexion with the executive and the most dignified branch of the legislature secures to the judicial department the support of those great powers of the state; augmenting, at the same time, its weight with the nation by the high guarantees which this mode of appointment affords.

The British constitution also connects the legislative and executive with the judicial department. For the crown is both a branch of the legislature, and the fountain of justice, which is administered in the Queen's name by her judges. In this distinct and separate existence of the judicial power in a peculiar body of men, appointed indeed, but not removable at pleasure by the crown, consists one main preservative of public liberty, which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.⁵ Thus,

¹ Kent, *Com.* vol. 1, lect. 14, pp. 291, 292, 294; Story, *Com.* vol. 2, ch. 7, § 541; Blackst. *Com.* vol. 1, ch. 7, pp. 267, 268; *Federalist*, num. 78, pp. 419, 420.

² Blackst. *Com.* ubi sup.; Kent, *Com.* vol. 1, lect. 14, p. 295.

³ Kent, ubi sup. p. 291.

⁴ *Ibi.*

⁵ Blackst. *Com.* vol. 1, ch. 7, p. 269.

while the judges are independent of the crown, the judicial office emanates from the regal dignity, and is supported by the influence and majesty of the sovereign. To this influence we must add that of the House of Lords, which is not only the highest legislative assembly, but the supreme court of appeal, and therefore part of the judicial branch of government. And in the performance of their judicial duties the lords are frequently assisted by the judges of the superior courts of law, some of whom are moreover from time to time raised to the peerage; and the Lord Chancellor, the highest judicial magistrate of the kingdom, is *ex officio* the speaker of that assembly, both in its legislative and its judicial functions. All these things tend to secure the dignity and independence of the judicial department of the state.

We must now briefly consider the most important restraint on the judicial power, namely, its division between judges and juries. Trial by jury has exercised a valuable influence on jurisprudence by bringing the doctrine of juridical proofs to its true and natural principles, as contradistinguished from the artificial theory of evidence: but it may be doubted whether this institution affords the best method of determining disputed questions of fact. We are, however, to view it here only as a means of maintaining the balance of power in a constitutional state by restraining the judicial department, and so securing the liberties of the people. Under this aspect its chief value is in criminal cases, though matters involving the most important rights of the citizens may be decided in civil actions. And it is necessary to observe, that a very large proportion of the civil administration of justice in this country, and part even of the administration of the criminal law, is carried on without the intervention of juries.

If the judicial power were entrusted exclusively either to the permanent judges or to the people, there would be danger of giving too much power in the former instance to the executive, towards which those magistrates are likely to lean, and in the latter, to the democracy, whose decisions would be capricious and unsafe. And it has been remarked, that the existence in any community of a standing body of functionaries, invested with the sole power of deciding upon accusations involving the liberty and life of their fellow citizens, must endanger liberty.⁴ And the same principle applies in a modified sense to civil cases. Therefore, the judicial power is divided between the judges and the people: and juries have been called the commons of the judicial order. In a country where a strong aristocratic element forms part of the constitution, this division is also useful as a protection to the people against the power and influence of the aristocracy,

⁴ Montesq. *Esprit des Loix*, liv. 11, ch. 6.

with whom the judges may naturally have some community of feelings and interests. Trial by jury, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. And thus a distribution of the judicial power obviates the danger of a union between the judicial department and the executive, or with the nobles and the executive, which would destroy the balance of a mixed constitution.

CHAPTER XXVII.

OF COMPOUND STATES OR SYSTEMS OF STATES.

Provinces—Colonies and Colonial Policy—States united by having one King in common—States joined by Confederation—Mode of deciding Questions among Confederates—Dissolution of Confederations—Mixed Federal States exemplified by the Constitution of the United States of America.

ONE important class of mixed governments remains to be considered. The term *mixed* is here applied to states of this sort in a sense somewhat different from that in which we have hitherto used it. And the more correct denomination is that of compound or irregular states. I refer to federal governments or constitutions.

The plan of human society given by Domat, founded on the two great primary laws, and constructed by means of the various ties which unite men together, shows the first principle on which polities of this kind are created. We have seen that, according to Domat, God makes the society of mankind to subsist by three several kinds of ties, which distinguish it into three parts or orders, according to so many manners of His conduct towards mankind. The first of these ties, and the second, that is to say Religion, and common humanity or human nature, are universal; and the third, which is formed in every state, by the order which unites all the families whereof it is composed under one government, is restricted within the territories of each state.* The second order or part of universal society, which is formed and maintained among nations by humanity and natural equity common to all mankind, gives rise to the use of a variety of treaties or conven-

* Domat, Droit Publ. Preface.

tions which connect or unite nations with each other in a multitude of different ways, and for different purposes. Domat shows that man is destined to society by two kinds of engagements—the general ties which God makes among all men by their nature and their destination to the same end under the same laws,—and the particular ties binding men towards specified persons, which include all sorts of contracts and agreements formed differently, either by the several communications which pass among men of their labour and industry, and all sorts of offices, services, and other assistances, or by those which relate to the use of things.* The treaties or conventions among nations are analogous to this second kind of engagements among individuals, for nations stand towards each other in the relation in which men are placed to one another by universal human society, which occasions the use of various dealings and communication among them. And as individuals may form different associations and bodies politic or corporate among themselves, so may nations unite themselves one with another, dividing and moulding the institution of sovereignty so as to maintain their union, and yet not extinguish their particular corporate individuality and rights.¹ This takes place by conventions grounded on the interests and wants of nations, or in consequence of a war, by which a country loses part only of its sovereignty and separate independent existence, and that part is incorporated with the government of another country. We shall, however, see that though the principle of agreement and convention belongs to this class of governments, yet there is a sort of federal constitution which unites all the members of the community in the last of the three ties, and brings them together in the third of the orders into which Domat divides human society. In this case the federal constitution has all the qualities of a fundamental law, and is to be considered as such, and not as a compact or treaty.²

Pufendorf describes compound states (*systemata civitatum*) to be—an assemblage of several states, closely bound together by some particular tie, so that they appear to form one body, though each preserves sovereignty in itself independent of the others.³ “It follows,” says the same writer, “from this definition, that we must not, as Hobbes does,⁴ rank among compound states those which simply include several subordinate bodies, nor those that have aggrandized themselves by swallowing up other states which they have incorporated with their

* Domat, *Loix Civiles, Traité des Loix*, ch. 2, § 3.

¹ Story, *Com. on Constit. of the United States*, vol. 1, ch. 3, § 311.

² Story, *ubi sup.* § 352.

³ Pufend. *Droit des Gens*, liv. 7, ch. 5, § 16.

⁴ *Leviath.* c. 22.

former dominions. This takes place in two principal ways. One is when a conqueror removes the conquered people into his own dominions, or gives to them the same laws and privileges enjoyed by his former subjects; and the other way is when, leaving the conquered nation in their country, he abolishes their government, so that they remain purely and simply subjects of their conqueror. In both these cases, the conquered people ceases to be a state; but in the former the new subjects are on an equality with the old, while in the latter the conquered are reduced to a more disadvantageous position, and rendered a mere province. Nevertheless, the conquered people are frequently allowed to retain part of their laws and privileges, however different they may be from those of the conquerors.* For the unity of a state does not necessarily require that all the country belonging to it should be governed by the same positive laws, nor that all the subjects should be in an equally advantageous condition. It suffices that all be under a common sovereign power. And it is often a measure of policy to change nothing of the ancient customs of the conquered, or at least to leave them to a certain extent untouched. As for conquered provinces, Hobbes maintains that Judæa, under its Roman governors, was neither a democracy nor an aristocracy, because public affairs were not in the hands of an assembly of Jews. He then asks whether it was not a monarchy; for he says that the Roman government was an aristocracy or a democracy with regard to the Roman citizens, but that does not preclude it from being a monarchy with regard to the Jews; for the sovereignty of a state over other states is as much a monarchy as that of a single person over a multitude of men. Thus Hobbes seems to regard as monarchies, provinces subject to an aristocratic or democratic state. But though provinces, as he shows elsewhere at length,^a are usually governed by a single person rather than by an assembly; it is, in my opinion, useless to debate the question what is the form of the government of provinces. For every province, which no longer has in itself a sovereignty of its own, ceases to be a state, and becomes a dependency of another state. And whether such province obey a governor or an assembly, that is not material to the form of the government, for they both have but a subordinate power. Thus the sovereignty exercised over provinces, or dependencies of a state, is always of the same nature, and cannot, except improperly, be called aristocracy or monarchy; for this distinction of forms of government is applicable

* Hobbes, *Leviath.* c. 26.

^a *Ibi*, c. 22.

only to states properly so called, which have a sovereignty of their own."^b

We must here observe, that Pufendorf uses the term province, not in its ordinary sense, as contradistinguished from the capital, city, or principal seat of government, but as signifying a dependency, such, for instance, as a colony. These cannot constitute, with the mother country or the state on which they depend, a compound state, because they are not in themselves states. Thus all the colonies and plantations of the British empire are equally subject to the supreme authority of the Imperial Parliament, whatever may be the form of the provincial government; and they have no reserved or proper sovereignty of their own. The famous Declaratory Act, 18 Geo. III. c. 12, has been held not to limit the right of parliament to legislate for the colonies. It declares, "that from and after the passing of this act, the king and parliament of Great Britain will not impose any duty, tax or assessment whatever payable in any of his majesty's colonies, provinces or plantations, in North America or the West Indies, except only such duties as it may be expedient to impose for the regulation of commerce; the net produce of such duties to be always paid and applied to and for the use of the colony, province or plantation in which the same shall be respectively levied, in such manner as other duties collected by the authority of the respective general courts or general assemblies of such colonies, provinces or plantations, are ordinarily paid and applied." This act contains no abandonment of right. Its recitals set forth only the inexpediency of the taxation of the colonies by parliament, and then the statute declares that parliament will no longer exercise this right.^c Thus, we may conclude, that no part of the *jura majestatis* is reserved to the colonies in a sovereign capacity, for whatever is done by their provincial governments, even with the concurrence of the crown, may be annulled by parliament.^d *

It is however necessary to observe, that these principles of our Public Law are modified in practice. For the spirit of recent colonial policy has been to leave to the colonies the management of their internal affairs; extending to them the privileges of self-government, as far as their circumstances will admit, having regard to their own interests and those of the empire at large. The most important practical point of this policy is the introduction of responsible parliamentary govern-

^b Pufend. ubi sup. § 16.

^c See the Speech of Lord Chancellor Brougham, Aug. 12th, 1833, Hansard, vol. 20, 3rd ser. cols. 521, 522. The Declaratory Act is held to apply only to those colonies which have legislative assemblies. *Ibi*.

^d See the definition of sovereign power by Grotius, *Droit de la Guerre*, liv. I, ch. 3, § 7.

ment into the colonies themselves. It was urged by the late Earl of Durham, in his report on the affairs of Canada,* that the government there could not be conducted with ease or harmony, excepting by the advice of persons having the confidence of the house of assembly. "If," he said, "colonial legislatures have frequently stopped the supplies, if they have harassed public servants by unjust or harsh impeachments, it was because the removal of an unpopular administration could not be effected in the colonies by those milder indications of a want of confidence, which have always sufficed to attain the end in the mother country." He urged that the governor should be instructed to secure the co-operation of the assembly in his policy, by entrusting it to such men as could command a majority in the assembly or colonial parliament, and that it should be made necessary for the official acts of the governor to be countersigned by some public functionary; and that changes of administration ought to take place in the colonies on the same principles on which they occur at home.

The difficulty of the system consists in this, that it places the government of the colonies under two sets of ministers, one responsible to the colonial, and the other to the imperial parliament. And the governor of the colony is himself responsible to the crown, to parliament, and to the colonial legislature, who may at any time address the Queen to remove him. Thus, the government at home may compel the colonial governor to take a course rendering it impossible for him to form an administration possessing the confidence of the provincial parliament. And so the whole government of the colony may be brought to a stand. The remedy against this danger is to be found in the wisdom and moderation of parliament, and the responsible servants of the crown at home; and in a prudent discrimination between matters of imperial and of provincial government or policy. This method of managing dependencies gives, in practice, a federal character to our colonial system, without violating the principles of Public Law, on which the unity of the empire depends; and it is calculated to prolong the connexion of the colonies with the mother country. The federal element of the system will probably develop itself, and become a constitutional law, securing a wholesome independence to the colonies, in all that does not involve the integrity and general interests of the empire. And at the same time, its natural effect is to prepare for the useful enjoyment of complete independence, or to become integral portions of other states, such colonies as their own domestic interests and the course of events may hereafter separate

* Earl of Durham's Report, 1839, pp. 100, 101.

from the mother country. This last consideration is not pleasing to our feelings of national pride and patriotism; but it is grounded on principles of true statesmanship. For, as we have shown,^f the division of mankind into nations and states is a subordinate or subsidiary institution of Public Law; and the boundaries of states are matter of arbitrary law, subject to be varied and modified by political events, in accordance with the welfare and prosperity of particular communities, and the general good government of mankind. This position may seem a truism, and yet its neglect has caused much bloodshed, and retarded the progress of civilized society. For princes and nations have often imagined, that to secure or retain a certain territory was a sacred duty which could not be neglected without guilt and disgrace, and must therefore be performed, whatever might be the consequences, though in direct violation of the principles on which mankind are divided into political communities, for the purposes of civil society, founded on the two great primary laws. And so history presents many instances of conquests injurious alike to the conqueror and the conquered, obstinately retained with the sacrifice of much human life and happiness; and provinces or dependencies converted into bitter enemies, which by a wise and timely emancipation would have become valuable allies of the mother country.

Pufendorf divides compound states (or *systemata civitatum*) into two sorts: one is where two or more distinct states have hut one king; and the other is where two or more confederated states form together but one body politic.

With regard to the first sort, he observes, that there is no reason why several politic bodies should not have one common head. This sort of compound state may be produced in several ways. The most usual are the marriage of princes and the right of succession. Thus, if a princess, sovereign in her own right, marry a foreign sovereign, the two states will be connected, or united, at least in the children of that marriage; for it is not in that case necessary that the princess and her dominions should be subject to her husband. The heir to a kingdom may be the sovereign of another state, and thus the two states may be united. The same thing occurs when a nation choose for their king a prince already sovereign of or heir to another state. Two or more nations may agree together to elect the same king, without ceasing to be distinct kingdoms, and without establishing a general assembly for deliberation on all their public affairs in common. And a compound state is formed when a king, established by the free consent of his

^f Chap. XIII.

subjects, subjugates another nation in his own particular and proper name, at his own risk and peril, and at his own expense, without the act or assistance of his subjects.*

But one person may be king of two or more states without their forming a compound state. For their fundamental laws may keep the several crowns entirely distinct and unconnected. And so it was with the kingdom of Hanover and the united kingdom of Great Britain and Ireland. "As for any foreign dominions," says Blackstone, "which may belong to the person of the king by hereditary descent, by purchase or other acquisition, as the territory of Hanover and his majesty's other property in Germany; as these do not in anywise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever."^b

As the union of this sort of compound states is solely founded on the person of a common prince, or at the utmost on the royal family, it is clear that when that family is entirely extinct, the body formed by the connexion of the states is dissolved, and each nation may create a king for itself, or introduce any other form of government, without the concurrence of any external person. This would be so, assuming that those kingdoms were united solely by their dependence on a common king. Thus, if a prince already in possession of a hereditary state, has become the sovereign of another by election, the union of those states ends on his death, and the elective state is not bound to choose his son to succeed him. But when two or more kingdoms are joined into one body by a confederation between them, if one of those states violate the principal articles, at least, of the treaty, the others who are injured thereby are entitled to break the alliance. Pufendorf, however, draws a distinction between the obligation of each confederated nation towards their common king, and their obligations towards each other. For, he says, a king once elected, to whom an oath of fidelity has been taken, cannot be deposed for every sort of wrongful act, even though committed contrary to his engagements, so long as he does not act as a declared enemy of the nation, unless the convention giving him the sovereign authority contains a *commissory clause* or clause of forfeiture,^c making the obedience of his subjects depend on the observance of all and each of the articles of the contract. In that case the breach of any of them will deprive him of his crown, and so dissolve the body united in his person. But as regards the reciprocal obligation of the

* Pufend. Droit des Gens, liv. 7, ch. 5, § 17.

^b Blackst. Com. vol. 1, p. 110; stat. 12 & 13 Will. 3, c. 2; Heineccii Prælect. in Pufend. De Offic. Hom. et Civ. lib. 2, cap. 8, § 13.

^c Grotius, Droit de la Guerre, liv. 1, ch. 3, § 16.

nations joined under the same prince, that nation to whose prejudice the laws of the confederation have been violated, may separate itself, though the injury be not very considerable, provided the other nations concurred in the wrongful act, or if it be produced and turned to their profit. Thus, on the death of their common prince, the injured nations may separate themselves from the others, and afterwards act against the authors of or accomplices in the wrong, to obtain reparation, or to recover what has been taken from it. If several states are conjoined by virtue of a marriage making a Prince the heir to them all, and the order of succession of the crown be differently regulated in them, there the union is dissolved when the same person cannot succeed to all those kingdoms according to their fundamental laws. This would be when in one of two kingdoms so joined, the *agnatic* or male, and in the other, the *cognatic* or female succession prevails, and the reigning sovereign dies without male issue: for then the former kingdom will devolve on the next male heir, while the latter will descend to the daughter of the deceased sovereign. But if an union of states, originally formed by marriage or descent, be confirmed and rendered perpetual by confederation or by a law binding on them all, the diversity of their several laws of succession must be held to be thereby abolished; and in such case that law of succession must be followed which is expressly provided in the treaty or law of union, or that which is known to be most conformable to the will of the author of the union, or the most natural or most advantageous to the united kingdoms. But when a kingdom becomes a province of another, there is no confederation, for the two states then become one.⁴

We come now to the second sort of compound states, or, as Martens calls them, systems of confederated states.¹ These are, as Pufendorf tells us, formed by the perpetual confederation of several states, which usually originates from the fact that they desire to preserve the liberty of governing themselves, each according to its own laws, and yet do not feel strong enough singly to defend themselves against common enemies. "States so united," he continues, "engage with each other to exercise in common some part of the sovereign power. For the principal difference between this sort of perpetual confederation which joins nations in one body, and the alliances usually made by nations with each other, is, that in the latter each ally determines by his own judgment to do certain things agreed upon among the allies, but without making the exercise of that part of the sovereign power, to which those engagements relate, depend on the

⁴ Pufend, *Droit des Gens*, liv. 7, ch. 5, § 17.

¹ Martens, *Droit des Gens*, liv. 1, ch. 3, § 29.

consent of the others; and without giving up anything of the full and absolute rights of the government of the particular state. Besides, mere alliances usually have for their object some particular advantage of each ally, and are only for a certain time. But this sort of confederation of which we are treating consists in this—that several nations, without ceasing to be distinct states, unite together with a view to their preservation and mutual defence, making, for this purpose, the exercise of certain parts of sovereignty to depend on their common consent. Thus there is a great difference between saying ‘*I bind myself to aid you in this or that war, and to deliberate with you as to the way of acting against the enemy* ;’ and agreeing thus :—‘*that neither of us shall make war or peace except by mutual consent*.’ I have said that in these confederations constituting compound states, the parties subject only some parts of the sovereign power to be exercised by common consent. For the interests of the confederates can scarcely be so united together as to make it advantageous to all in general, and each in particular, to exercise no portion of sovereignty except in common. And if this were so, they would far better be united in a single state than bound together by a mere confederation. Each confederated state must reserve to itself full power to do as it thinks proper all that belongs to those parts of sovereignty which are of such a nature that the other united states have little or no interest, at least directly, in the way of their exercise. Such, for instance, are treaties of commerce; the establishment of the imposts necessary for the individual wants of the particular state; the creation of magistrates; the laws; the right of life and death over its own citizens; its power in ecclesiastical affairs, and the like; with regard to which, however, each state should be careful to do nothing calculated to disturb the union. The same must be the case regarding ordinary affairs, or those which do not leave time to consult the other confederates. But as for those regarding the welfare of the whole body, they must be decided in a common assembly. Such are especially war, both offensive and defensive, and peace whereby it is terminated. And if any difference arise among any of the members of a compound state, the others who are disinterested ought in the first instance to intervene as mediators, and prevent the disputants from proceeding to hostilities. It follows from what we have said, that each of the confederated states has full liberty to exercise as it thinks proper all those parts of the sovereign power which are not mentioned in the treaty of confederation as powers to be exercised in common.”^m

Pufendorf proposes the question, whether the decision of the

^m Pufend. ubi sup. § 18. See Bynkershoek, *De modis conciliandi dissentientes provincias*. Quæst. Jur. Publ. lib. 2, cap. 24.

common affairs of the confederation depends on the unanimous consent of all the confederates, or whether the opinion of the majority must be binding on all. He holds that the latter practice may be followed in an *irregular* compound state, which is in the nature of a *simple* state, that is to say, when several states form a single state: but that it could not be admitted in a regular body of confederated states. For, he says, as the liberty of a state is the power of deciding in the last resort on all matters touching its own preservation, a state cannot be conceived to be free when another can with authority compel it to do certain things. The confederates have, it is true, agreed to exercise in common certain parts of the sovereign power. But there is a distinction between this and the power of a majority to compel the others to do that which is not stipulated in the treaty of confederation. He further explains this point by observing, that the engagement of several persons to have but one will, proceeds either from a mere convention or agreement, or from the subjection of the will of one to that of the other. "The indispensable concurrence of several wills, which is grounded on a mere convention or agreement, does not infringe the liberty of which we speak. For either the mode in which certain affairs are to be administered conjointly has been beforehand regulated by common consent: or else, if something afterwards arise to be decided, each party claims to be only bound to give way to good and sufficient reasons. But when we submit our will to that of another, and he has thereby obtained an authority over us, he may oblige us even to things which are displeasing to us."* Pufendorf argues that the rule which gives authority to the plurality of votes is not here applicable. For it refers to assemblies already constituted, that is to say, simple bodies and not confederations. But he adds, that if one of the confederates refused with bad faith to agree to the opinion of the others, and showed unreasonable obstinacy, to the betrayal of the common cause, it would be lawful to use against him the means allowed by natural law against violators of treaties and alliances: or that inconvenient member who troubled the peace of the society, and who acts so as to ruin it, may be banished from it. Except in such cases, he adds, there may be great injustice in following the rule of the plurality of votes; as, for example, where some of the confederated states are more powerful than the others, and thus they contribute unequally to the public defence. For though they each contribute in proportion to their means, and thus there is a sort of equality of contribution, yet it may happen often that the weaker state is more willing to expose its contingent than the stronger. Thus,

* Pufend. ubi sup. § 20.

supposing that one of the states brings to the support of the common interests as much as all the others together, would it be just that they, without the consent of that state and against its will, should undertake any enterprise or other matter, the great expense and burthen of which would fall on the dissentient? But, on the other hand, if the number of votes of each state in the confederation be in proportion to its contribution to the common welfare, this will give to a state so superior in power an authority over the other confederates. Pufendorf concludes that if in an assembly of confederated states, affairs are absolutely decided by plurality of votes, it is not a regular compound state, but an irregular body, or even one single simple state, and not a confederation.* The doctrine of Pufendorf is, that when in a compound state of this sort anything is to be decided that has not been settled by the instrument of confederation, the decision must be, not that of a majority, but unanimous.

"Compound states are dissolved," continues the same writer, "when some of the confederates detach themselves to govern their affairs separately. And this usually happens," because they think the union more burthensome than useful to themselves. Intestine wars, also, among the confederates break up the union, unless the confederation be renewed on the conclusion of peace. As for wars with foreign powers, when the confederated states have been unsuccessful, the victor sometimes, as a measure of policy, separates them, and compels them to remain disunited, each^a governed according to its own laws, as the Romans did with regard to the people of Achaia. Hereupon it is necessary to remark, that when the common enemy has taken possession of one of the confederated states, he does not thereby acquire a right over the others; and he cannot claim to make them his conquest, nor even to be received into the confederation, by virtue of the place occupied therein by the conquered state. He can only be admitted by a new treaty or convention, as we see in the case of King Philip of Macedon, who was admitted into the assembly of the Amphycyons in the place of the Phocians,^c in consequence of a decision of the whole body. For though the union of several states seems to be by a *real*, as contradistinguished from a *personal* confederation, that is to say, a treaty with the body of the state itself, and not merely with the sovereign,^d and a nation, the form of whose government is changed, does not lose its identity on that account: yet, as the confe-

* Pufend. ubi sup. § 20.

^a Livy, lib. 38, cc. 31, 32.

^c Xenophon, lib. 4, Hellenic. ch. 8, § 14, et seq.; lib. 5, cap. 1, § 16, edit. Ox.

^d Diod. Sicul. lib. 16, cap. 61.

^e See Pufend. Droit des Gens, liv. 8, ch. 9, § 6.

deration was made between the nations, considered precisely as so many distinct states, it follows that when one of them is subjugated, or becomes a dependency of another state, the confederation no longer subsists with regard to it. Even if it be stipulated in the treaty that a change in the form of the government of one of the confederated states shall not exclude it from the body, such stipulation must be understood to refer to changes made in a lawful manner, as by the free consent of the people.¹ Thus neither an usurper in the nation itself, nor a foreign conqueror, can claim a place in the general assembly of the confederated states. A compound state, or system of states, also becomes a simple state, if all the confederates submit themselves to the sovereign authority of one man or one assembly; or if one of the states, by superiority of power, reduce the others to the condition of provinces, which usually occurs when the weaker states confer on the stronger one some permanent pre-eminence, and they enter into an unequal² confederation, or the same result is produced if one of the confederates becomes master of the others, by the favour of the army or the people, or by cabals."³

These reflections on simple confederations or systems of states, forming together compound states, show that their corporate character and action are necessarily restricted to certain specified parts of the sovereign power, which, by their federal constitution, they are to exercise in common in their sovereign capacity. And these compound states differ from simple ones, in being societies depending for their union on contract or convention, and not constituted by means of a sovereign power, supreme over every member of the body politic. We have already considered this matter in explaining the connexion of the *jura majestatis* with each other;⁴ but it will not be superfluous to add here the following arguments of Mr. Hamilton, showing the defects of the confederation of the United States of America,⁵ which was superseded by the constitution.

"The great and radical vice in the construction of the existing confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist. Though this

¹ The expression used by Pufendorf may seem to imply that no change in the form of government can lawfully be made except by the free consent of the people. But this is not so, for the organic laws of states differ greatly in this respect. Thus, an absolute monarchy may be converted into an aristocracy, and vice versa, without the concurrence of the people.

² Grotius, l. 1, c. 3, § 21, num. 10.

³ Pufend. Droit des Gens, liv. 7, chap. 5, § 21.

⁴ Chap. XXII.

⁵ Federalist, num. 15, p. 78—80.

principle does not run through all the powers delegated to the union; yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of appointment the United States have an infinite discretion to make requisitions for men and money, but they have no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet, in practice, they are mere recommendations, which the states observe or disregard at their option. It is a singular instance of the capriciousness of the human mind, that, after all the admonitions we have had from experience on this head, there should still be found men who object to the new constitution, for deviating from a principle which has been found the bane of the old, and which is in itself evidently incompatible with the idea of a government; a principle, in short, which, if it is to be executed at all, must substitute the violent and sanguinary agency of the sword, to the mild influence of the magistracy. There is nothing absurd or impracticable in the idea of a league or alliance between independent nations, for certain defined purposes precisely stated in a treaty, regulating all the details of time, place, circumstance, and quantity, leaving nothing to future discretion, and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compact, from which the politicians of the times fondly hoped for benefits which were never realized. With a view to establishing the equilibrium of power, and the peace of that part of the world, all the resources of negotiation were exhausted, and triple and quadruple alliances were formed, but they were scarcely formed before they were broken, giving an instructive but afflicting lesson to mankind, how little dependence is to be placed on treaties which have no other sanction than the obligations of good faith, and which oppose general considerations of peace and justice to the impulse of any immediate interest of passions. If the particular states in this country are disposed to stand in a similar relation to each other, and to drop the project of a general discretionary superintendence, the scheme would indeed be pernicious, and would entail upon us all the mischiefs which have been enumerated under the first head; but it would have the merit of being at least consistent and practicable. Abandoning all views towards a confederate government, this would bring us to a simple alliance, offensive and defensive, and would place us in a situa-

tion to be alternately friends and enemies of each other, as our mutual jealousies and rivalships, nourished by the intrigues of foreign nations, should prescribe to us. But if we are unwilling to be placed in this perilous situation, if we still adhere to the design of a national government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the union to the persons of the citizens, the only proper objects of government. Government implies the power of making laws. It is essential to the idea of a law that it be attended with a sanction, or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolution or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation. This penalty, whatever it may be, can only be inflicted in two ways,—by the agency of the courts and ministers of justice, or by military force, by the coercion of the magistracy, or by the coercion of arms. The first kind can evidently apply only to men; the last kind must of necessity be employed against bodies politic, or communities or states. It is evident that there is no process of a court by which their observance of the laws can, in the last resort, be enforced. Sentences may be denounced against them for violations of their duty, but these sentences can only be carried into execution by the sword. In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war, and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it."

These arguments of the American statesman are in accordance with the principles of Pufendorf, explained above, and they show the difference between a system of confederated states, and a federal government. The latter species of constitution we must now examine.

Mr. Hamilton* comments on the opinion of Montesquieu, recommending a small extent of territory for republics; and he observes, that that opinion is not opposed to the enlargement of the orbit within which popular systems of civil government are to revolve, by the consolidation of several smaller states into a great confederacy. And he cites the following passage of Montesquieu, explicitly treating of a confederate republic, as an expedient for extending the sphere of popu-

* Federalist, num. 9, pp. 45, &c.

lar government, and reconciling the advantages of monarchy with those of republicanism. "It is very probable that mankind would have been obliged at length to live constantly under the government of a single person, had they not contrived a kind of constitution which has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a *confederate republic*. This form of government is a convention, by which several smaller states agree to become members of a larger one, which they intend to form. It is a kind of assemblage of societies that constitutes a new one, capable of increasing by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body. A republic of this kind, able to withstand an external force, may support itself without any internal corruption. The form of this society prevents all manner of inconveniences. If a single member should attempt to usurp the supreme authority, he could not be supposed to have equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would remain free might oppose him with forces, independent of those which he had usurped, and overpower him before he could be settled in his usurpation. Should a popular insurrection happen in one of the confederated states, the others would be able to quell it. Should abuses creep into one part, they are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; the confederacy may be dissolved, and the confederates preserve their sovereignty. As this government is composed of small republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies."^b

These objects of federal government can only be attained by combining the federal principle with that of simple national government and unity. We must now see how this may be contrived, by referring to the solution of the problem in the United States of America. The constitution of that country would, as we have already observed, be an unlimited democracy, if the sovereign power were not divided between the States and the Union, which distribution causes a balance of power. Madison, commenting on this mixed character of the then proposed American constitution, makes the following observations.^c He shows that the act establishing the constitution was a federal, not a national act. For though the constitution was founded on the assent

^b Montesq. *Esprit des Loix*, liv. 9, ch. 1; Story, *Comment. on the Constit. of the United States*, vol. 1, § 473.

^c *Federalist*, numb. 39, pp. 206, &c.

and ratification of the people of America, given by their deputies, yet such assent and ratification was given by the people, not as individuals, composing one entire nation, but as composing the distinct and independent states to which they respectively belonged. And it was the result, not of the decision of a majority of the States, but of their unanimous assent. Here we find the principle laid down by Pufendorf, that a federal act should be unanimous, and should not be merely that of a majority of the confederates or their representatives. And Madison accordingly holds, that were the people regarded in that transaction as forming one nation, the will of the majority of the people, or of the States, as evidence of the will of the people, would bind the minority. But, on the contrary, each State, in ratifying the constitution, was considered as a sovereign body, independent of all others, and only bound by its own act.^d But though this was the nature of the original act of establishing the constitution, Story shows, at great length, that the constitution, considered in itself, is not a compact or confederation, but a fundamental law.^e And in this sense, as Mr. Webster has said, the constitution declares that it is ordained by the people of the United States, that is to say, established by the people of the United States in the aggregate and taken collectively.^f If it were otherwise, the constitution would be, not a law, or as it is emphatically called, the *supreme law of the land*, but a compact or treaty, like the confederation which it superseded.

Madison next regards the constitution, in relation to the sources from which the ordinary powers of government are derived. And herein we principally see its mixed character. The House of Representatives derives its powers from the people of America, and the people are represented in the same proportion as to numbers, and on the same principle, as they are in the legislature of each particular state.^g So far the government is national, not federal. The senate, on the other hand, the members of which are elected by the legislatures of the states, derives its powers from the states as political and co-equal societies; and each state is represented without reference to population, by the same number of senators, i. e. two, on the principle of equality. So far the government is federal, not national.^h And this equal representation of the states in the senate is a protection to the residuary sovereignty of the smaller states, who have fewer representatives in the other branch of the legislature. We come now to the executive power. The immediate part of the

^d Federalist, num. 39, p. 207.

^e Story, Comment. on the Constit. of the United States, book 3, ch. 3.

^f *Ibi*, § 363; Webster, Speeches, 1830, p. 431; Elliot, Debates, vol. 4, p. 326.

^g Kent, Comment. vol. 1, part 2, lect. 11, pp. 229, 230.

^h Federalist, p. 207; Kent, Comment. vol. 1, part 2, lect. 11, pp. 224, 225.

election of the President, that is to say, the choice of those who are to elect him, is made by the states in their political characters. For the electors are chosen in each state under the direction of the legislature, and their number must be equal to the whole number of senators and representatives which the state is entitled to send to Congress; and so, under the apportionment of Congress, in 1832, the number of electors was 281.¹ The eventual election of the President is made by that branch of the legislature which consists of the national representatives; but in this particular act they are thrown into the form of individual delegations, from so many distinct and co-equal bodies politic.² For the person having the greatest number of votes of the electors for President, is President, if such number be a majority of the whole number of electors appointed. But in the event of no person having such majority, then from the persons having the highest number, not exceeding three, on the list of those voted for as President, the House of Representatives choose immediately (or before the 4th of March following), by ballot, the President. But in the choosing the President, the votes of the members of the House of Representatives are taken by states, the representation from each state having but one vote.³ In this case, therefore, the election is partly federal.

If the United States constitution be viewed with reference to the operation of the government, it is not federal, but national. For the powers of the government, in its ordinary and most essential proceedings, operate, not as was the case under the confederation, on the political bodies composing the confederacy, but on the individual citizens composing the nation in their individual capacity.⁴ In some cases, however, and particularly in the trial of controversies, to which the states may be parties, they must be viewed and proceeded against in their collective and political capacities.⁵

"But," continues Madison, "if the government be national, with regard to the *operation* of its powers, it changes its aspect again, when we contemplate it in relation to the extent of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for

¹ Federalist, *ibi*; Kent, Comment. *ibi*, pp. 274, 275.

² Federalist, p. 207.

³ Kent, Comment. *ibi*, lect. 14, pp. 276, 277.

⁴ Federalist, p. 208; Kent, Comment. vol. 1, lect. 10, p. 213—217.

⁵ Federalist, pp. 208, 209.

particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme, and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects. It is true, that, in controversies relating to boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government. But this does not change the principle of the case. The decision is to be impartially made, according to the rules of the constitution, and all the usual and most effectual precautions are taken to secure this impartiality. Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact; and that it ought to be established under the general, rather than under the local governments; or, to speak more properly, that it could be safely established under the first alone, is a position not likely to be combated."

"If we try the constitution by its last relation to the authority by which amendments are to be made, we find it neither wholly *national* nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the people of the Union; and this authority would be competent at all times, like the majority of any national society, to alter or abolish its established government. Were it wholly federal, on the other hand, the concurrence of each state in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles.* In requiring more than a majority, and

* The fifth article of the Constitution respects the mode of making amendments to it. It is in these words:—"The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate." Story, Comment. vol. 3, § 1820.

particularly in computing the proportion by *states*, not by *citizens*, it departs from the national and advances towards the *federal* character; in rendering the concurrence of less than the whole number of states sufficient, it loses again the *federal* and partakes of the *national* character." "The proposed constitution, therefore, even when tested by the rules laid down by its antagonists, is, in strictness, neither a national nor a federal constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national."

The federal character of the United States constitution depends on the residuary sovereignty of the states, which is not vested in the Union. For the constitution of the United States is an instrument containing the grant of specific powers, and the government of the Union cannot claim any powers but what are contained in the grant, and given either expressly or by necessary implication. The powers vested in the state governments by their respective constitutions, or remaining with the people of the several states, prior to the establishment of the constitution of the United States, continue unaltered and unimpaired, except so far as they are granted to the United States. The people of the United States have declared the constitution to be the supreme law of the land, and it is entitled to universal and implicit obedience. Every act of Congress, and every act of the legislatures of the states, and every part of the constitution of any state, which is repugnant to the constitution of the United States, is void. The judicial power of the Union is declared to extend to *all cases* in law and equity, arising under the constitution; and to the judicial power it belongs, whenever a case is judicially before it, to determine what is the law of the land. The determination of the supreme court of the United States, in every such case, must be final and conclusive, because the constitution gives to that tribunal the power to decide, and gives no appeal from that decision.[†]

This right of the courts to pronounce legislative acts void, because contrary to the constitution, may seem at first to imply a superiority of the judicial to the legislative power, because in general the authority which can declare the acts of another void must be superior to the one whose acts are declared void.[‡] But limitations of the power of a legislative body or magistrate can in practice be preserved in no other

[†] Kent, Comment. vol. 1, lect. 15, pp. 312, 313.

[‡] Federalist, num. 78, p. 420.

way than by means of the courts of justice. And this doctrine is strictly in accordance with the principles of Public Law.

The act of a delegated authority, contrary to the commission or beyond the commission under which it is exercised, is void. Therefore no legislative act, contrary to the constitution, can be valid. *Diligenter fines mandati custodiendi sunt; nam qui excedit, aliud quid facere videtur.*¹ Now the judicial power can declare void the acts of the legislative power, where those acts are beyond the powers delegated to the legislature, and therefore in reality not legislative acts, except in form only. Thus the judicial is not placed above the legislative power, because the former must obey the valid acts of the latter. The power of the people is superior to both; and where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.² As the constitution is the supreme law of the land, in a conflict between that and the laws, either of Congress or of the States, it becomes the duty of the judiciary to follow that only which is of paramount obligation.³

It was urged, when the constitution was under discussion, that the legislative body were themselves the constitutional judges of their own powers. But this doctrine is at variance with the spirit of a constitution granting specific powers, and thereby limiting the authority of the legislature. For that body would not be fitting tribunal to judge of restrictions on itself; and it would have a natural tendency to enlarge its own power and narrow that of the state legislatures. It is far more reasonable that the courts should be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. Besides, the interpretation of the laws is the proper and peculiar province of the courts; and a constitution is in fact, and must be regarded by the judges as, a fundamental law.

The principle of Public Law, regarding the power of the United States government, is thus laid down by Mr. Hamilton: "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and the complete execution of the trusts for which it is responsible; free from every other control, but a regard to the public good and to the sense of the

¹ L. 5, ff. Mandati; Voet ad Pand. lib. 17, tit. 1, § 11.

² Federalist, p. 422.

³ Story, Comment. vol. 3, § 1570; Federalist, num. 78, 80-82; *Marbury v. Madison*, 1 Cranch, 137.

people."^a Therefore, the powers of Congress extend generally to all subjects of a national nature. Congress are authorized "to provide for the common defence and general welfare, and for that purpose, among other express grants, they are authorized to lay and collect taxes, duties, imposts and excises; to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states, and with the Indian tribes; to declare war and define offences against the law of nations; to raise, maintain and govern armies, and a navy; to organize, discipline and arm the militia; and to give efficacy to all the powers contained in the constitution. Some of these powers, as the levying of taxes, duties and excises, are concurrent with similar powers of the several states, but in most cases these powers are exclusive, because the concurrent exercise of them by the states separately would disturb the general harmony and peace, and because they would be apt to be repugnant to each other in practice, and tend to dangerous collisions."^b A concurrent jurisdiction in the article of taxation is the only admissible substitute for an entire subordination, in respect to this branch of power, of state authority to that of the Union.^c But the constitution provides that no state "shall enter into any treaty, alliance or confederation; grant letters of marque or reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility. No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, nor lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."^d With regard to the President, his chief powers are these; he is commander in chief of the army and navy of the United States, and of the militia of the several states when called into the service of the Union.^e He has the power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.^f He is the efficient power in the appointment of the officers of the government. He is to nominate, and, with the advice and consent of the senate, to

^a Federalist, num. 31, pp. 159, 160.

^b Kent, Comment. vol. 1, lect. 11, p. 237.

^c Federalist, numb. 34, p. 175; and see numb. 30, 31.

^d Constitution, art. 1, sect. 10; Kent, Comment. vol. 1, lect. 19, p. 407.

^e Constitution, art. 2, sect. 2.

^f Art. 2, sect. 2.

appoint ambassadors, or public ministers and consuls, the judges of the supreme court, and all other officers whose appointments are not otherwise provided for in the constitution; but Congress may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.^c And, as I have already explained, the President has a qualified negative on the acts of the Congress.^d As for the judicial power of the Union, its extent is in accordance with the political axiom laid down by Kent—that “the judicial power of every well constituted government must be co-extensive with the legislative power, and must be capable of deciding every judicial question which grows out of the constitution and laws.”^e

It would be beyond the scope of these Commentaries to examine the reasons of the provisions of the American constitution thus briefly stated. We have dwelt chiefly on those portions which show how a form of polity partly federal and partly national or simple is constructed. That sort of constitution is peculiarly adapted to a country the vast extent of which renders something more than a provincial government requisite for the parts distant from the capital, or seat of central power, and composed of communities originally separate, and having a strong feeling of corporate individuality and local patriotism. And it affords remarkable facilities for the acquisition of territory by the annexation of new states. For these are more willing to join in a confederation leaving to them a residuary sovereignty, with all the privileges of citizenship in a great nation, than they would be to become provinces, in any sense of the word, of a kingdom or republic. Yet this form of civil polity is liable to the defects arising from the complex nature of its machinery, and it has not that vigour and energy in the executive department which can only be secured by unity and simplicity, and which an American statesman has pronounced to be a leading character in the definition of good government.^f These inconveniences arise from principles of public law already explained. The executive power divided between the President and the chief magistrates of the States, especially presents a difficulty in the structure of this government. And this shows the still greater and perhaps insurmountable difficulty of a mixed confederate government composed of monarchical states. For the very nature of the regal office would cause a spirit of independence of, or opposition to, the authority of the Union, and destroy the harmony of the system, so as to paralyze its action. And indeed it is questionable whether this form

^c Art. 2, sect. 2.

^d Art. 1, sect. 7. And see above, pp. 315, 316.

^e Kent, Comment. vol. 1, lect. 15, p. 328.

^f Federalist, pp. 378, 379.

of government can be constructed on any other than republican principles.

The steam engine and the electric telegraph tend to diminish the use and value of federalism, by facilitating intercourse, and connecting different places and communities together; and these means, as well as the progress of civilization, naturally diminish or extinguish local pride, and exclusive national or municipal feelings, which are the great obstacles to a central authority. And, indeed, the tendency of our times is often too strongly towards what is called centralization, which if carried beyond what the unity and vigour of government, and the benefits of uniformity, regularity, and economy require, is liable to many grave inconveniences.

CHAPTER XXVIII.

THE PUBLIC LAW OF THINGS.

Double Aspect of the Law of Things—Distinction between the Public and Private Law of Things—The Four Classes of Things not Private, according to Justinian—Domat's general View of the Public Law of Things—Things common to all Men—Common Right over Rivers—The Common Rights of Mankind over the High Seas, and the Freedom of the Seas—Appropriation of Parts of the Sea—Jurisdiction over Ships, and Right of Senesch—Public Things—Rivers, Ports, Shores of the Sea, and Banks of Rivers—Territories of a State—Uninhabited and partly inhabited Countries and Land—Hunting Ground of Savago Tribes—Effect of the Change of the Course of Rivers which are Boundaries—Law regarding Alluvion or Alluvial Accretions—Lakes—Acquisition of Territories by Occupancy—Analysis of the Property of a Nation—Public Property—Imposts and Taxes—*Dominium eminens*—*Res universitatis*—The Property of Bodies Corporate—*Res nullius*—Ecclesiastical Things—Conclusion.

THE use of all things in the world has some relation to the order and economy, or interests of society and the commonwealth; and if the second of the three great divisions of law, that is to say, the *law of things*, be regarded under this aspect, the whole of it may seem to be within the scope of Public Law, both universal and municipal. Thus, as we have seen, there are many laws in different countries regulating private property, settlements, wills, and successions, which have a direct relation to the political laws of the state and the form of the civil polity. And judicial decisions on questions of private right are

sometimes grounded on reasons of public policy.* A bad law regarding private property may diminish the wealth and power of the whole community, or affect its peace, morality, and good order. And though every citizen has a right to manage and dispose of his property as he thinks fit, yet this right is subject to such regulations and laws as the public welfare requires. But, on the other hand, care should be taken not to restrain the people unnecessarily in the management of their affairs, as this would be contrary to the public good and the just liberty of the citizen.^b These reflections on the double aspect of laws and their relation to society in general and the commonwealth, even when their direct object is of a private nature, are not without importance in the science of legislation. The reason of this connexion between public and private law is, that all laws are, as we have shown, or ought to be, consequences, either direct or indirect, of the two fundamental laws on which society is built; those of the former sort being immutable rules of equity necessary for the order of society, while the laws of the latter kind are positive laws, the justice of which depends on their fitness and adaptation to that order and the particular circumstances of the commonwealth to which they belong.

Thus the spirit of the whole law of things has this public element, because of the relation which their use bears to society, and the way in which the laws regulating them spring from the two fundamental laws of society. And we have seen that the second of the two classes of engagements by which man is destined to society, includes all those engagements which connect persons together, and are formed in divers ways by the several communications which pass among men of their labour, of their industry, and of all sorts of offices, services, and other assistances, or by those which relate to the use of things. And this includes all the different uses of arts, of employments, and of professions of all kinds, and everything else that may link persons together, according to the several wants of life, whether by free and gratuitous communications, or by commerce.^c So the use of things is one of the foundations of society. And the law regarding that use chiefly belongs to secondary natural law.^d We must now show the distinction between public and private law in the *law of things*.

* 2 Barn. & Ald. 287; 5 Barn. & Ald. 287; 3 Barn. & Cress. 156; 3 Bing. 538; 5 Bing. 169; Cas. temp. Talb. 142; 3 P. W. 393, 394; 1 Atk. 352; 2 Atk. 136; Ambl. 235; 2 Anstr. 539; 4 Bro. C. C. 124; 3 Madd. 114; 1 Sch. & Lef. 312; 2 Ball & B. 478; *Lawton v. Lawton*, 3 Atk. 16; *Egerton v. Brownlow*, 4 House of Lords Cas. 1.

^b Vattel, *Droit des Gens*, liv. 1, ch. 20, § 254, 255; Inst. lib. 1, tit. 8, § 2.

^c Domat, *Loix Civiles*, *Traité des Loix*, ch. 2, § 3.

^d L. 5, ff. De Just. et Jur.

Justinian thus classifies things with reference to the nature of their appropriation. "They are either in the patrimony of some one (*in nostro patrimonio*), or not in the patrimony of any one (*extra patrimonium nostrum*). For some things are common to all men by natural law, some are public, some belong to corporate or politic bodies (*res universitatis*), some belong to no one (*res nullius*), many to individuals, and those are acquired in divers ways."¹ We must apply to this classification of things the principle of the law of Ulpian describing public law. *Publicum jus est, quod ad statum rei Romanæ spectat: privatum quod ad singulorum utilitatem: sunt enim quædam publice utilia, quædam privatim. Publicum jus in sacris, in sacerdotibus, in magistratibus consistit.*"

Four classes of things are, as appears from the extract given above, mentioned by Justinian as not private property, or *extra nostrum patrimonium*, that is to say—I. *Res jure naturali communia omnium*: II. *Res publica*: III. *Res universitatis*: and IV. *Res nullius*. Having given this outline of the subject, and before entering into the explanation of these heads, we will see how Domat takes a general and comprehensive view of the law of things in Public Law.

"Having explained in the preceding titles that which relates to the general order of the government, we shall explain in this the general policy of certain things which are of common use to this society, and which it is necessary to distinguish from those which every person may consume for his own private use. In order to distinguish these sorts of things from all others, and to understand rightly the policy of their use, it is necessary first to observe that there is nothing in the world which God has not created for the use of man, and that every thing in it is proportioned to his nature, and to his wants; so that we see in the structure of the world, and in the order and beauty of every thing contained in the earth and in the heavens, the dignity of man, for whom all these things have been made, and the relation which all this great fabric of the universe hath to his use, and to his wants.² And in this infinite multitude of things of all kinds, with which we are environed in this world, it is necessary to distinguish two different sorts of them, and two different manners of the use which God gives us of them. The first of these two sorts of things is of those which are so necessary that no body can live without having a free and continual use of them, such as the air and light; and it is because of

¹ Instit. lib. 2, tit. 1, princip.; Voet ad Pand. lib. 1, tit. 8, § 1.

² L. 1, § 2, ff. De Just. et Jur.

³ Deut. iv. 19; Psalm viii.; Gen. i. 26; Heb. ii. 7. See Domat, Treatise of Laws, ch. 1, num. 3.

this necessity that the air encompasses the whole earth, which is the habitation of mankind, and that it is penetrated by the light which comes from the heavens, so that nobody can be deprived of the use of the air, and of the light, unless condemned to lose his life. And as to the manner of this use, as it is of a continual necessity it is likewise so easily to be had, that it does not require any industry or labour; and every one has his proper use of these things, independently of the will of all others. Thus the government has nothing to regulate in this matter. It can only take precautions to keep the air pure, and forbid the throwing out or exposing anything in the public places which may infect it and render it unwholesome. The second sort of things is of those which are necessary to men for food, raiment, for habitation, and all other sorts of wants, which takes in the earth, the waters, and every thing they bear and bring forth, grain, fruits, plants, animals, metals, minerals, and all other things. And as for the manner of using all these things, it is distinguished from the manner of using the air and light, in that all those other things come to our use only by the means of some labour and industry, either in procuring them or in fitting them for the use that is to be made of them. It is for this use of this second kind of things, that seeing they are all necessary in the society of mankind, and cannot be had and put to any use, except by ways which demand different ties and intercourses among mankind, not only from one part of a kingdom to another, but from one country to another, and between nations that lie the most remote from one another, God has taken care by the order of nature, and men by the civil policy, to facilitate the said intercourses. Thus it is by nature, that one of the uses which God has given to the seas, and to rivers, is that of opening ways of communication with all the countries in the world by navigation. And it is by means of the civil policy that towns and other places have been built, where men assemble together, and have intercourse with one another by means of streets, market places, and other public places proper for that purpose; and that the inhabitants of every town, every province, every kingdom, may have intercourse with all other persons, of what country soever, by the means of highways. Thus, for all these intercourses by land and water, it has been necessary to establish rules by this policy; and these rules shall make a part of the subject-matter of this title. As for the other rules of this title, it is to be remarked, that, besides this use of the seas and rivers, for the intercourse of men, they have another use, which is likewise naturally common to all men, that of fishing. The surface of the earth gives likewise naturally to men the use of hunting, especially in the woods and forests, which have, moreover, another use of much

greater importance for the common good, by the great advantage the public draws from the use of timber for building houses and ships, for warlike engines, for the artillery, for bridges, for the construction of public edifices, churches, palaces, and others. It is because of these uses that the ordinances in France have established a policy, not only in relation to the king's forests, and those belonging to churches, and to all sorts of communities, but also to those which belong to private persons, that they may be preserved for the said uses as occasion shall offer. And as to what concerns the use of hunting and fishing, in which the liberty granted by the Roman Law was much greater than is allowed by ours ;^{*} seeing this liberty, given to all persons without distinction, would be attended with many inconveniences, whether it were by diverting people from their occupation, and encouraging idleness, or by occasioning quarrels between those who should hunt or fish in the same place, or because of the damage that would accrue to the public by fishing and hunting in certain seasons of the year, or with certain tackle and in certain manners which would destroy the wild animals and the fish, it has been thought reasonable to provide against them ; and the civil policy in France has set bounds to this liberty by several ordinances, which regulate to whom the liberty of hunting and fishing is permitted ; which prohibit the use of it in certain manners and certain seasons, and give other particular directions therein."[†]

Some portions of this extract refer to the internal Public Law of France before the first revolution ; but it gives a good general view of the connexion of the various matters which are the subject of the Public Law of things, and their different uses, which show the spirit of the laws regarding them. Those laws are of two sorts, that is to say, arbitrary laws, of which the municipal law of all countries presents a vast extent and detail ; and others, coming within a narrower compass, and which are part of the law of nature, and contain the principles of all the rest.[‡] We may gather from these reflections of Domat, that those things are the subject-matter of Public Law, the uses of which have a direct reference to the service or advantage of society in general, or of some particular civil community. And this is in accordance with the law of Ulpian already cited, where he says, *sunt enim quædam publice utilia, quædam privatim*. Yet we shall see that many of those

^{*} L. 13, § 7, ff. De injur. ; Instit. § 2, De rerum divis. ; l. 1, § 1, ff. De acquir. rer. domin. ; Instit. § 12, De rer. divis. ; l. 1, § 1, ff. De acquir. vel amitt. possess. ; l. 3, 55, ff. De acquir. rer. dom. ; l. 2, § 9, ff. Ne quid in loco publ. ; l. 13, § 7, ff. De injur.

[†] Domat, Droit Publ. liv. 1, tit. 8. I have given Dr. Strahan's translation, 1722.

[‡] Domat, ibi.

things are devoted to the public service and advantage, so that their use is for the benefit of private persons also.⁷ We will now consider the four heads under which Justinian places things *extra patrimonium*. And, first, of things common to all men.

Both Grotius and Pufendorf deduce the appropriation of things which must have been originally common to all men, from the very constitution and organic laws and necessities of the social state; and such appropriation is, as we have already observed, necessary, not only for the use and enjoyment of things, but for the peace of society, and the very existence of arts, agriculture, and every branch of industry.⁸ But it follows from these very principles, that those things, the exclusive appropriation of which, either to a portion of mankind or to certain individuals or exclusive purposes, is unnecessary for the objects of the social state, and the purposes above referred to, must remain by natural law common to all men, as they are evidently intended to be. Thus light and air cannot be brought under the exclusive power of any one person, for their use is common to all, and no kind of exclusive appropriation is requisite for their full enjoyment. They are, therefore, not divided among a number of owners as other things are.

On the same principles, the Roman Law holds running waters to be common to all men.⁹ But this decision does not apply to waters, the exclusive appropriation of which is necessary for certain purposes, such as water inclosed in a pipe or vessel for some particular use. The common right to running water, therefore, exists only in those cases where the quantity of water is so great that its entire exclusive appropriation is not necessary, having regard to the general objects of the institution of property.¹⁰ In such cases as these, to prevent any man from using and appropriating to himself portions of the water without injuring the common right and enjoyment of others, would be contrary to natural law.¹¹

Grotius, however, holds that rivers are capable of being subject to a qualified right of property. He argues that liquids have no boundaries of their own nature, for a liquid must be limited in its extent by something differing from it in nature, that is to say, some solid.¹² Now

⁷ Donelli Comment. De Jur. Civ. lib. 5, cap. 5, § 13.

⁸ Grot. Droit de la Guerre, liv. 2, ch. 2, § 2; Pufend. Droit des Gens, liv. 4, ch. 4; M'Culloch, Princip. of Polit. Econ. ch. 2, § 2, pp. 82, 90.

⁹ Instit. lib. 2, tit. 1, § 1.

¹⁰ Grot. Droit de la Guerre, liv. 2, ch. 2, § 3. And see the whole of Chap. V. of the 6th book of Pufend. Droit des Gens, with Barbeyrac's notes.

¹¹ Grot. ibi, § 12.

¹² See Co. Litt. 4 a; Blackst. Com. h. 2, ch. 2, p. 18, edit. Coleridge.

a river is bounded in its breadth, though not in its length, for the water flows between its banks. Therefore, though it may be considered as one body of moving water, yet the particles of which that body is composed remain the property of whoever is owner of the banks and bed only while they are within those bounds.^a This is what in the English law and the writings of jurists is called transient or qualified property. It is also qualified regarding the matter in question by the rule of natural law, that no man can without injustice prevent another from using that which is of such a nature that all men may use it without injury to each other and with equal advantage to each.^b Thus the owner of a river or part of it could not justly forbid persons navigating it or being lawfully on its banks, from drinking and otherwise using portions of the water without any injury to his rights and enjoyment of the stream. The same principles explain the rule *cujus est solum, ejus est usque ad cælum*, adopted by the English from the civil law.^c It was observed by Lord Ellenborough, that if it were trespass to interfere with a column of air superincumbent on a close, an action of trespass might be brought against an aeronaut by the owner of every field over which he passed in his balloon.^d Barbeyrac, in his notes on Grotius, shows that air is susceptible of being subjected to a qualified right of property analogous to that over running water, so far as exclusive appropriation is essential to the enjoyment of rights over other things.^e The same doctrines hold good as to light, portions of which may be subjected to a transient right of property as accessory to the enjoyment of other property.

These principles will assist us to comprehend the great and celebrated question of the nature of the common rights of mankind over the high seas. The following passage from Vattel gives so good a view of the subject that its length will not be regretted.

"The open sea is not of such a nature as to admit the holding possession of it, since no settlement can be formed on it so as to hinder others from passing. But a nation powerful at sea may forbid others to fish in it and to navigate it, declaring that she appropriates to herself the dominion over it, and that she will destroy the vessels that

^a Grot. ubi sup.; and see l. 2, ch. 3, § 7, &c.; Vinnii Comment. ad Instit. lib. 2, tit. 1, § 2, num. 2.

^b Grot. ibi, liv. 2, ch. 2, § 11.

^c L. 21, § 2, ff. Quod vi aut clam.

^d *Pickering v. Rudd*, 4 Campb. 219.

^e Grot. Droit de la Guerre, liv. 2, ch. 2, § 3, note 3, 4; Pufend. Devoir de l'Homme et du Cit. liv. 1, ch. 12, § 6, Barbeyrac; and § 4, note 2.

shall dare to appear in it without her permission. Let us see whether she has right to do this."

"It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is to say, he who navigates or fishes in the open sea, does no injury to any one, and the sea, in these two respects, is sufficient for all mankind. Now nature does not give to man a right of appropriating to himself things that may be innocently used, and that are inexhaustible and sufficient for all. For since those things, while common to all, are sufficient to supply the wants of each, whoever should, to the exclusion of all participants, attempt to render himself sole proprietor of them, would unreasonably wrest the bounteous gifts of nature from the parties excluded. The earth no longer furnishing without culture the things necessary or useful to the human race, who were extremely multiplied, it became necessary to introduce the right of property, in order that each might apply himself with more success to the cultivation of what had fallen to his share, and multiply by his labour the necessities and conveniences of life. It is for this reason the law of nature approves the rights of dominion and property, which put an end to the primitive manners of living in common. But this reason cannot apply to things which are in themselves inexhaustible; and consequently it cannot furnish any just grounds for seizing the exclusive possession of them. If the free and common use of a thing of this nature were prejudicial or dangerous to a nation, the care of their own safety would authorize them to reduce that thing under their own dominion, if possible, in order to restrict the use of it by such precautions as prudence might dictate to them. But this is not the case with the open sea, on which people may sail and fish without the least prejudice to any person whatsoever, and without putting any one in danger. No nation, therefore has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations. The kings of Portugal formerly arrogated to themselves the empire of the seas of Guinea and the East Indies,* but the other maritime powers gave themselves little trouble about such a pretension."

"The right of navigating and fishing in the open sea being then a right common to all men, the nation that attempts to exclude another from that advantage does her an injury, and furnishes her with sufficient grounds for commencing hostilities, since nature authorizes a nation to repel an injury, that is, to make use of force against whoever would deprive her of her rights."

* See Grotius, *Mare Liberum*, and Selden, *Mare Clausum*, lib. 1, cap. 17.

"Nay, more, a nation which, without a legitimate claim, would arrogate to itself an exclusive right to the sea, and support its pretensions by force, does an injury to all nations; it infringes their common right; and they are justifiable in forming a general combination against it, in order to repress such an attempt. Nations have the greatest interest in causing the law of nations, which is the basis of their tranquillity, to be universally respected. If any one openly tramples it under foot, they all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty towards themselves and towards human society, of which they are members (Prelim. s. 22). However, as every one is at liberty to renounce his right, a nation may acquire exclusive rights of navigation and fishing, by treaties, in which other nations renounce, in its favour, the rights they derive from nature. The latter are obliged to observe their treaties; and the nation they have favoured has a right to maintain by force the possession of its advantages. Thus the House of Austria has renounced, in favour of England and Holland, the right of sending vessels from the Netherlands to the East Indies. In Grotius, *De Jure Belli et Pacis*, lib. 2, cap. 3, s. 15, may be found many instances of similar treaties."

"As the rights of navigation and of fishing, and other rights which may be exercised on the sea, belong to the class of those rights of mere ability (*jura meræ facultatis*) which are imprescriptible (s. 95), they cannot be lost for want of use. Consequently, although a nation should happen to have been from time immemorial in sole possession of the navigation or fishery in certain seas, it cannot, on this foundation, claim an exclusive right to those advantages. For though others have not made use of their common right to navigation and fishery in those seas, it does not thence follow that they have had any intention to renounce it; and they are entitled to exert it whenever they think proper."

"But it may happen that the non-usage of the right may assume the nature of a consent or tacit agreement, and thus become a title in favour of one nation against another. When a nation that is in possession of the navigation and fishery in certain tracts of sea, claims an exclusive right to them, and forbids all participation on the part of other nations, if the others obey that prohibition with sufficient marks of acquiescence, they tacitly renounce their own right in favour of that nation, and establish a new right, which she may afterwards lawfully maintain against them, especially when it is confirmed by long use."

¹ See Grot. *Droit de la Guerre*, liv. 2, ch. 3, § 15; and see the notes by Barbeyrac.

"The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, &c. Now, in all these respects its use is not inexhaustible; wherefore the nation to whom the coast belongs may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property; and though, where the catching of fish is the only object, the fishery appears less liable to be exhausted; yet if a nation have on their coast a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature, as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive in case there be sufficient abundance of fish to furnish the neighbouring nations. But if, so far from taking possession of it, the nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive freedom, at least with respect to those who have been accustomed to take advantage of it. The English not having originally taken exclusive possession of the herring fishery on their coasts, it is become common to them with other nations.

"A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts, as far as they are able to protect their right. It is of considerable importance to the safety and welfare of the state, that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of trading nations, and molest their navigation. During the war between Spain and the united provinces, James I., king of England, marked out, along his coasts, certain boundaries within which he declared that he would not suffer any of the powers at war to pursue their enemies, nor even allow their armed vessels to stop and observe the ships that should enter or sail out of the ports.[†] These parts of the sea, thus subject to a nation, are comprehended in her territory, nor must any one navigate them without her consent. But to vessels that are not liable to suspicion, she cannot, without a breach of duty, refuse permission to approach for harmless purposes, since it is a duty incumbent on every proprietor to allow to strangers a free pas-

[†] Selden's *Mare Clausum*, lib. 2.

sage, even by land, when it may be done without damage or danger. It is true, that the state itself is sole judge of what is proper to be done in every particular case that occurs; and if it judge amiss it is to blame; but the others are bound to submit. It is otherwise, however, in case of necessity; as, for instance, where a vessel is obliged to enter a road which belongs to you, in order to shelter herself from a tempest. In this case, the right of entering wherever we can, provided we cause no damage, or that we repair any damage done, is, as we shall show more at large, a remnant of the primitive freedom, of which no man can be supposed to have divested himself, and the vessel may lawfully enter in spite of you, if you unjustly refuse her permission."

"It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. Bodinus^b pretends that, according to the common right of all maritime nations, the prince's dominion extends to the distance of thirty leagues from the coast. But this exact determination can only be founded on a general consent of nations, which it would be difficult to prove. Each state may, on this head, make what regulations it pleases, so far as respects the transactions of the citizens with each other, or their concerns with the sovereign; but between nation and nation, all that can reasonably be said is, that in general the dominion of the state over the neighbouring sea extends as far as her safety renders it necessary, and her power is able to assert it; since, on the one hand she cannot appropriate to herself a thing that is common to all mankind, such as the sea, except so far as she has need of it for some lawful end (§ 281), and, on the other, it would be a vain and ridiculous pretension to claim a right which she were wholly unable to assert. The fleets of England have given room to her kings to claim the empire of the seas which surround that island, even as far as the opposite coasts.¹ Selden relates a solemn act,¹ by which it appears that, in the time of Edward I. that empire was acknowledged by the greatest part of the maritime nations of Europe; and the Republic of the United Provinces acknowledged it, in some measure, by the treaty of Breda, in 1667, at least so far as related to the honour of the flag. But solidly to establish a right of such extent, it were necessary to prove very clearly the express or tacit consent of all the powers concerned. The French have

^b In his Republic, book 1, ch. 10; Grot. Droit de la Guerre, liv. 2, ch. 3, § 10, num. 2; Wolf, Jus Gent. § 129—132. Lord Stowell held, that for the sea out of reach of cannon shot, common use is presumed. *The Twee Gebroeders*, 3 Rob. Rep. 336; Kent, Com. vol. 1, lect. 2, p. 29.

¹ See Selden's *Mare Clausum*.

¹ *Ibi*, lib. 2, cap. 28.

never agreed to this pretension of England, and in that very treaty of Breda just mentioned, Louis XIV. would not even suffer the channel to be called the English Channel or the British Sea. The Republic of Venice claims the empire of the Adriatic; and every body knows the ceremony annually performed upon that account. In confirmation of this right, we are referred to the examples of Uladislaus, king of Naples, of the emperor Frederic III., and of some of the kings of Hungary, who asked permission of the Venetians for their vessels to pass through that sea.^k That the empire of the Adriatic belongs to the Republic to a certain distance from her own coasts, in the places of which she can keep possession, and of which the possession is important to her own safety, appears to me incontestable; but I doubt very much whether any power is at present disposed to acknowledge her sovereignty over the whole Adriatic sea. Such pretensions to empire are respected as long as the nation that makes them is able to assert them by force; but they vanish of course on the decline of her power. At present the whole space of the sea within cannon shot of the coast is considered as making a part of the territory; and for that reason, a vessel taken under the cannon of a neutral fortress is not a lawful prize."

"The shores of the sea incontestably belong to the nation that possesses the country of which they are a part, and they belong to the class of public things. If civilians have set them down as things common to all mankind (*res communes*), it is only in regard to their use; and we are not thence to conclude that they considered them as independent of the empire. The very contrary appears from a great number of laws. Ports and harbours are manifestly an appendage to and even a part of the country, and consequently are the property of the nation. Whatever is said of the land itself will equally apply to them, so far as respects the consequences of the domain and of the empire."

"All we have said of the parts of the sea near the coast may be said more particularly, and with much greater reason, of roads, bays, and straits, as still more capable of being possessed, and of greater importance to the safety of the country.^l But I speak of bays and straits of small extent, and not of those great tracts of sea to which these names are sometimes given, as Hudson's Bay and the Straits of Magellan, over which empire cannot extend, and still less can a right of property.

"A bay whose entrance can be defended may be possessed, and rendered subject to the laws of the sovereign; and it is of importance that it should be so, since the country might be much more easily insulted

^k See *ibi*, lib. 1, cap. 16.

^l See the Treaty of the Dardanelles, 1841; Wheaton, *Hist. of the Law of Nations*, p. 385. And see Martens, *Droit des Gens*, liv. 2, ch. 1, § 42.

in such a place than on a coast that lies exposed to the winds and the impetuosity of the waves."

"It must be remarked with regard to straits, that when they serve for a communication between two seas, the navigation of which is common to all or several nations, the nation which possesses the strait cannot refuse the other a passage through it, provided that passage be innocent, and attended with no danger to herself. By refusing it without just reasons, she would deprive those nations of an advantage granted them by nature; and, indeed, the right to such a passage is a remnant of the primitive liberty enjoyed by all mankind. Nothing but the care of his own safety can authorize the owner of the strait to make use of certain precautions, and to require certain formalities, commonly established by the customs of nations. He has a right to levy a moderate tax on the vessels that pass, partly on account of the inconvenience they give him by obliging him to be on his guard; partly as a return for the safety he procures them, by protecting them from their enemies, by keeping pirates at a distance, and by defraying the expense attendant on the support of lighthouses, sea-marks, and other things necessary to the safety of mariners." Thus the king of Denmark requires a custom at the straits of the Sound. Such right ought to be founded on the same reasons, and subject to the same rules, as the tolls established on land or on a river. (§ 103 and 104.)"

"It is necessary to mention the right to wrecks—a right which was the wretched offspring of barbarism, and which has almost everywhere, fortunately, disappeared with its parent. Justice and humanity cannot allow of it, except in those cases only where the proprietor of the effects saved from a wreck cannot possibly be discovered. In such cases those effects belong to the person who is the first to take possession of them, or to the sovereign, if the law reserves them for him."

"If a sea is entirely inclosed by the territories of a nation, and has no other communication with the ocean than by a channel, of which that nation may take possession, it appears that such a sea is no less capable of being occupied, and becoming property, than the land; and it ought to follow the fate of the country that surrounds it. The Mediterranean in former times was absolutely inclosed within the territories of the Romans; and that people, by rendering themselves masters of the straits which joins it to the ocean, might subject the Mediterranean to their empire, and assume the dominion over it. They did not by such procedure injure the rights of other nations; a particular sea being manifestly designed by nature for the use of the countries

= And see Wolf, *Jus Gent.* § 214; *Grot. Droit de la Guerre*, l. 2, tit. 3, § 14; *Vinnii Comm. ad Inst. lib. 2, tit. 1, § 1.*

and nations that surround it. Besides, by barring the entrance of the Mediterranean against all suspected vessels, the Romans, by one single stroke, secured the immense extent of their coasts; and this reason was sufficient to authorize them to take possession of it. And as it had no communication but with the states which belonged to them, they were at liberty to permit or prohibit the entrance into it, in the same manner as into any of their towns or provinces."

"When a nation takes possession of certain parts of the sea, it takes possession of the empire over them, as well as of the domain, on the same principle which we advanced in treating of the land. (§ 205.) These parts of the sea are within the jurisdiction of the nation, and a part of its territory. The sovereign commands there; he makes laws, and may punish those who violate them: in a word, he has the same right there as on land, and in general every right which the law of the state allow him."

"It is, however, true that the empire and the domain, or property, are not inseparable in their own nature, even in a sovereign state.^a As a nation may possess the domain or property of a tract of land or sea, without having the sovereignty of it, so it may likewise happen that she shall possess the sovereignty of a place of which the property or the domain, with respect to use, belongs to some other nation. But it is always presumed that when a nation possesses the useful domain (*dominium utile*) of any place whatsoever, she has also the higher domain and empire, or the sovereignty. (205.) We cannot, however, from the possession of the empire, infer with equal probability a co-existent possession of the useful domain; for a nation may have good reasons for claiming the empire over a country, and particularly over a tract of sea, without pretending to have any property in it, or any useful domain. The English have never claimed the property of all the seas over which they have claimed the empire."^b

Ulpian and Celsus distinctly hold the seas to be common to all mankind; and the celebrated declaration of the Emperor Antoninus, that "though he was the lord of the world, the law only was the ruler of the sea," has been held to convey the same doctrine.^c The contrary was powerfully maintained by Selden; while the freedom and community of the seas were vindicated by Grotius in his treatise *De Mare Libero*.^d

^a See book 2, § 83. And see Grotius, liv. 2, ch. 3, and n. 13, by Barbeyrac.

^b Vattel, *Droit des Gens*, liv. 1, ch. 23.

^c L. 13, ff. *Communia prediorum*; l. 3, § 1, ff. *Ne quid in loc. publ.*; l. 9, ff. *ad Leg. Rhodiam*; Gothofredus, in his *Opusc. De Imperio Maris*, explains this law somewhat differently.

^d The treatises of these two great men are entitled *Mare Clausum* and *De Mare Libero*. Wheaton, *Hist. of the Law of Nations*, pp. 152, 153; Kent, *Com.* vol. 1, p. 27. And see Bynkershoek, *De Domin. Maris Dissertatio*. See also Hargrave, *Law Tracts*, 10; Co. Litt. § 440, note 1; Martens, *Droit des Gens*, l. 2, ch. 1, § 43.

Pufendorf concurs in the views of Grotius,⁷ which are also adopted by Kent.⁸ "It is difficult," says the latter, "to draw any precise or determinate conclusion, amidst the variety of opinions, as to the distance to which a state may lawfully extend its exclusive dominion over the sea adjoining its territories, and beyond those portions of the sea which are embraced by harbours, gulfs, bays and estuaries, and over which its jurisdiction unquestionably extends.¹ All that can reasonably be asserted is, that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end. A more extended dominion must rest entirely on force and maritime supremacy. According to the current of modern authority, the general territorial jurisdiction extends into the sea as far as a cannon shot will reach, and no further; and this is generally calculated to be a marine league: and the Congress of the United States have recognized this limitation, by authorizing the district courts to take cognizance of all captures made within a marine league of the American shores."² The same authority holds that no nation has any right of jurisdiction at sea, except it be over the persons of its own subjects, in its own public and private vessels; and so far territorial jurisdiction may be considered as preserved, for the vessels of a nation are in many respects considered as part of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. They may be punished for offences against the municipal laws of the state committed on board its public and private vessels at sea, and on board its public vessels in foreign ports.³ This jurisdiction is confined to the ship; and no one ship has a right to prohibit the approach of another at sea, or to draw round her a line of territorial jurisdiction within which no other is at liberty to intrude. Every vessel in time of peace has a right to consult its own safety and convenience, and to pursue its own course and business, without being disturbed when it does not violate the rights of others."⁴

"It was declared," as we are informed by Kent, in the case of *Le Louis*,⁵ that "maritime states claim, upon a principle just in itself and

⁷ Pufend. *Droit des Gens*, liv. 4, eh. 5.

⁸ Kent, *Comment.* vol. 1, lect. 2, p. 26—31.

¹ Azuni, *On Marit. Law*, vol. 1, p. 206.

² Kent, *ibid.* p. 29; Bynkershoek, *Quæst. Jur. Publ.* c. 8; Vattel, l. 1, c. 23, § 289; Act of Congress, June 5th, 1794, c. 50; 3 Rob. Rep. 336.

³ Grotius, b. 2, c. 3, § 10, 13; Rutterford, b. 2, c. 9; Vattel, b. 1, c. 19, § 216; *Forbes v. Cochrane*, 2 Barn. & Cress. 448; Wheaton, *Elem. of International Law*, 110.

⁴ Kent, *ibid.* pp. 26, 27; *The Mariana Flora*, Wheaton, 38.

⁵ Dodson, *Adm. Rep.* 245.

temperately applied, a right of visitation and inquiry within those parts of the ocean adjoining to their shores. They were to be considered as parts of the territory for various domestic purposes, and the right was admitted by the courtesy of nations. The English hovering laws were founded on that right. The stat. 9 Geo. II. c. 35, prohibited foreign goods to be transhipped within four leagues of the coast without payment of duties; and the act of Congress of March 2, 1779, c. 128, secs. 26—28, contained the same prohibition; and the exercise of jurisdiction to that distance, for the safety and protection of the revenue laws, was declared by the Supreme Court, in *Church v. Hubbard*,^a to be conformable to the laws and usages of nations."^b

We will now proceed to the second head of things, that is to say, things public.

The civil law gives the denomination of *res publicæ* to things which belong to a commonwealth, so that the citizens and all men have a public common right to the use of them. Such are rivers, ports, and shores of the sea and banks of rivers.^c Therefore, by the Roman law, all men have a common right of fishing in rivers and ports.^d The same principle applies to the shore of the sea, which is defined by Justinian to extend *quatenus hybernus fluctus maximus excurrit*.^e Thus Justinian lays it down that the use of the shores of the sea is public and common to all men as the sea itself is; therefore it is lawful for men to build there, and to dry nets, as well as to draw up anything from the sea upon the shore. But the property of the shore may be understood to be in no one, and so partaking of the same legal nature as the sea, and the soil or sand under it.^f So he holds that the use of the banks of a river is public, *jure gentium*, as the river is. Thus vessels may touch there, and any one may tie ropes to the trees that grow there, and put down burthens, but the property of the banks is vested in those who are proprietors of the land whereof they form part; for which reason the trees growing upon the banks belong to those proprietors.^g

These general rules of Justinian regarding the sea shore are subject to some qualifications. Thus Scævola says, that it is lawful to build on the sea shore so far as the public utility will permit, and Celsus declares that the shores of the Roman territory belong to the Roman

^a 2 Cranch, 187.

^b Kent, Comment. vol. 1, p. 31.

^c Voet ad Pand. lib. 1, tit. 8, § 8; Vinnii Com. ad Instit. lib. 1, tit. 2, § 2.

^d Instit. lib. 1, tit. 2, § 2.

^e *Ibi*, § 3.

^f *Ibi*, § 5. And see stat. 1 Jac. c. 23; 10 Car. I. Sess. 2, c. 24. The principle of the former statute was probably derived from the civil law.

^g *Ibi*, § 4.

people.^b But by the Roman law the sea shore is not vested in the state, as in the Feudal and English law, which place the shores *inter jura regalia*.¹ The English law, however, gives a common public right of fishing to the people of England in the sea and its creeks or arms.¹ Such are the doctrines of the Roman law regarding things of this class, which are useful to be known because they are frequently used in questions of public law.

The territories or country of a state have some legal analogy to the public things of the civil law. For though the land is, for the most part, divided among different owners, and subject to various rights of property, yet the people, as such, have a general right of habitation, use, and enjoyment of the country. On this principle a whole country is said to belong to a nation, and individuals are restrained by a variety of municipal laws from so using their private rights of ownership over land, and water, and buildings, as to injure the public rights of society in general; and they are even compelled to part with their private property, on adequate compensation, when the benefit of the public requires this sacrifice.²

Practically, however, this general right of the community is chiefly confined to public places, which are public in such wise that individuals have the use of them, subject to their doing nothing to injure the rights of the community.¹ Such are public squares, streets, roads, and the like, which are within the province of public law.^m

These reflections are well confirmed by Vattel. He observes that the earth was given by God to mankind in general. But their multiplication made it impossible for the land to be possessed by all in common. It therefore became necessary for nations to settle in particular places, and appropriate to themselves certain portions of the earth and cultivate them.ⁿ Hence came rights of property, and dominion over land. "The country," he continues, "which a nation inhabits . . . that country is the settlement of the nation, and it has an exclusive and peculiar right over it. This right comprehends two things—I. the *Domain* (*dominium*), by virtue of which the nation alone may use this country for the supply of its necessities, may dispose of it as it thinks proper, and derive from it every advantage it

^b L. 4, ff. *Ne quid in loco publico*; ibi, l. 3.

¹ *Liber Feudorum*, lib. 2, tit. 56; Co. Litt. § 440, note 1.

² Co. Litt. p. 261 a; Lord Hale, *De Jure Maris*, p. 11; and see stat. 59 Geo. III. c. 109, s. 38.

^m On the latter subject, see Bynkershoek, *Quest. Jur. Publ.* lib. 2, cap. 15.

ⁿ Donelli *Comment. De Jur. Civ.* lib. 2, c. 5, § 12; l. 2, ff. *Ne quid in loc. publ.*

^o Donelli, ibi, § 13.

^p And see Hermogenianus, l. 5, ff. *De Just. et Jur. Ex hoc jure gentium . . . discreta gentes; regna condita; dominia distincta; agris termini positi . . .*

is capable of yielding; II. The *Empire* (*imperium*), or right of sovereign command, by which the nation directs and regulates at its pleasure everything that passes in the country.* This last position must however be understood subject to the divers modifications of the sovereign power arising from the constitution, or fundamental laws of each particular state. "When a nation," continues our author, "takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the *empire*, or sovereignty of it, at the same time with the *domain*. For since the nation is free and independent, it can have no intention, in settling in a country, to leave to others the right of command, or any of those rights that constitute sovereignty. The whole space over which a nation extends its government is called its territory."

"If a number of free families, scattered over an independent country, come to unite for the purpose of forming a nation or state, they all together acquire the sovereignty over the whole country they inhabit; for they were previously in possession of the domain, a proportional share of it belonging to each individual family; and since they are willing to form together a political society, and establish a public authority, which every member of the society shall be bound to obey, it is evidently their intention to attribute to that public authority the right of command over the whole country. All mankind have an equal right to things that have not yet fallen into the possession of any one, and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has sufficiently made known its will in this respect, it cannot be deprived of it by another nation. Thus navigators going on voyages of discovery, furnished with a commission from their sovereign, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nation, and this title has been usually respected, provided it was soon after followed by a real possession."

"But it is questioned whether a nation can, by the bare act of taking possession, appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate. It is not difficult to determine that such a pretension would be an absolute infringement of the natural rights of men, and repugnant to the views of nature, which, having destined the whole earth to supply the wants of mankind in general, gives no nation a right to appropriate to itself a country, except for the purpose of making use of it, and not of hindering others from deriving advan-

* Vattel, *Droit des Gens*, liv. 1, ch. 18.

tage from it. The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those of which it has really taken actual possession, in which it has formed settlements, or of which it makes actual use. In effect, when navigators have met with desert countries in which those of other nations had, in their transient visits, erected some monument to show their having taken possession of them, they have paid little regard to that empty ceremony. . . . There is another celebrated question, to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country, in which there are none but erratic nations, whose scanty population is incapable of occupying the whole. We have already observed (§. 81), in establishing the obligation to cultivate the earth, that those nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions cannot be accounted a true and legal possession; and the people of Europe, too closely pent up at home, finding land of which the savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies. The earth, as we have already observed, belongs to mankind in general, and was designed to furnish them with subsistence; if each nation had from the beginning resolved to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants."

"We do not therefore deviate from the views of nature, in confining the Indians within narrower limits.^p However, we cannot help praising the moderation of the English Puritans, who first settled in New England; who, notwithstanding their being furnished with a charter from their sovereign, purchased of the Indians the lands of which they intended to take possession.^q This laudable example was followed by William Penn, and the colony of Quakers that he conducted to Pennsylvania.

"When a nation takes possession of a distant country, and settle a colony there, that country, though separated from the principal establishment, or mother country, naturally becomes a part of the state, equally with its ancient possessions. Whenever, therefore, the political laws or treaties make no distinction between them, every thing said of the territory of a nation must also extend to its colonies."^r

^p See as to Indian lands, Kent, Comment. vol. 1, p. 257, &c.

^q History of the English Colonies in North America.

^r Vattel, Droit des Gens, liv. 1, ch. 18.

The occupation of territories by nations, considered as bodies politic and juridical persons, rests on the principles of natural law, regarding the acquisition of vacant things belonging to no one, by the original title of occupation ;³ which, in countries already occupied, may be qualified and restricted by municipal laws ;⁴ but, among independent nations, rests on the law of nature, because they have no common municipal laws. And many questions in the law of nations, regarding or arising out of the occupation of territories, may be decided or elucidated by means of the civil law.⁵

Grotius examines the question whether, when rivers change their course, they at the same time change the boundaries of states, and whether that which a river adds to its banks, augments the territory of the state on the side on which the addition takes place. He divides lands, with reference to the nature of their boundaries, into three classes. I. Lands specifically assigned by measurement and artificial boundaries, and metes and bounds, which Florentinus denominates *limited (agri limitati)*.⁶ II. Those which are assigned in gross, that is to say, limited in extent, as to so many acres, but without specific boundaries and landmarks.⁷ III. Lands bounded by natural limits, and called *agri arcifinii*.⁸ Barbeyrac, in his notes on Grotius and Pufendorf, expresses an opinion that they did not correctly give the meaning of the ancient writers who furnish this classification ; but he admits that the principle derived from the distinction, between lands defined by artificial limits or measurements, and the *agri arcifinii*, is correct. With regard to the lands of the two first classes, the change of the course of a river does not alter the boundaries, and whatever is added by alluvion is vacant, and belongs, by the law of nations, to whoever occupies or takes possession of it, because the extent and limits of the land are fixed and determined.⁹

With regard to the third class of lands, i. e. *agri arcifinii*, a river

³ Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* tom. 1, lib. 4, ch. 3, § 279, 284; Grot. *Droit de la Guerre*, liv. 2, ch. 3, and notes by Barbeyrac. *Quod ante nullius est, id naturali ratione occupanti conceditur.* *Instit.* lib. 2, tit. 1, § 12; l. 3, ff. *De acquirendo rerum dominio*.

⁴ Grot. *Droit de la Guerre*, liv. 2, ch. 3, § 5; Pufend. *Droit des Gens*, liv. 4, ch. 6, § 3, and note by Barbeyrac.

⁵ *Instit.* lib. 2, tit. 1, § 11—17; and see the Comment of Vinnius; *Pandect.* lib. 41, tit. 1, *De acquirendo rerum dominio*; and see the Comment of Voet, l. 41, t. 1.

⁶ l. 16, ff. *De acquir. rerum domin.* And see *Litt. sect.* 36.

⁷ See *Litt. sect.* 44.

⁸ Grot. *Droit de la Guerre*, liv. 2, ch. 3, § 16; Pufend. *Droit des Gens*, liv. 4, ch. 7, § 1, and Barbeyrac's notes; Zallinger, *Inst. Jur. Nat. et Eccles. Publ.* vol. 1, lib. 4, cap. 3, § 274.

⁹ *Ibi*.

which bounds them, changes the boundaries of the territory and jurisdiction, by gradually altering its course; and, whatever it adds on one side, belongs to the territory on that side, because the two states between which the river flows are presumed to have originally taken the center of the river as their natural boundary.^b This is so where the change of the course of the river is gradual. For there the change of its parts does not destroy its identity, but leaves it the same.^c But it is otherwise when the change is sudden and entire, for in that case, if the people into whose country the river has gone do not consent to lose part of their land, for the purpose of retaining the natural limits of the waters, the boundary is presumed to be the middle of the bed which the river has left.^d If the river flow between two states, and belong entirely to one of them, the islands formed therein belong entirely to that state; but the better opinion is, that the alluvion on the other side appertains to the state on that side.^e If, on the other hand, the river belongs to neither state, the islands and alluvions formed there are vacant, and will belong to whoever occupies them. But the state nearest to a new island, and that to whose land an alluvial addition grows, must be presumed to take possession rather than the other state.^f And if the boundary be in the middle of the river, and an island be formed in the middle, it will belong to both states in equal shares; but if it be nearest to one bank, the greater part or the whole will belong to the state on that side.^g If a river divide into branches in one place, and those branches join in another, the land thus enclosed, which becomes a sort of island, remains the property of its former owner.^h

It is not lawful to make on a river any works calculated to alter the course of the water, and throw it on the opposite bank. But each party may protect his own property, and prevent the current from carrying away his ground. In general, no works can be constructed on a river, or elsewhere, prejudicial to the rights of others. If a river belong to a nation, and another have an undoubted right of navigating it, the former must not construct dykes or mills which would cause the river

^b Pufend. liv. 4, ch. 7, § 11.

^c *Quapropter cujus rei species eadem consisteret, rem quoque eandem esse existimari.* L. 76, ff. De Judiciis.

^d Pufend. ibi.

^e Ibi.

^f Ibi.

^g *Instit. lib. 2, tit. 1, § 22, and the Comment of Vinnius; l. 7, § 3, ff. De acquir. rerum domin.; l. 1, § 6, 4, ff. De Fluminibus; ibi, § 10; Voet ad Pand. lib. 41, tit. 1, § 14.*

^h *Instit. ibi.*

to be no longer navigable. Its right is in this case a limited ownership, so that such right can only be exercised without prejudice to the rights of others.¹

Alluvion is thus defined in the civil law. *Est alluvio incrementum latens, quo quid ita paulatim agro adjicitur ut intelligi nequeat quantum quoquo temporis momento accedat.*² It is a mode of acquisition by natural law, called accession, which is a species of occupancy. For occupancy is either simple or consequent. The former is, where a man takes possession, as proprietor, of any thing which is the property of no one. It becomes his by right of occupancy, for, as Justinian says, *Quod ante nullius est, id naturali ratione occupanti conceditur.*³ The latter occurs, 1st, where any one's property produces fruit; and 2ndly, when anything adheres to or *acceeds* to and becomes part of the property of any one, for there the addition or increase is acquired by him as an accession to his property.⁴ And we have seen that alluvion is a means of acquiring territory to states,⁵ as well as simple occupancy.⁶

With regard to lakes, Vattel gives us the following principles of Public Law, "What we have said of rivers and streams may be easily applied to lakes. Every lake, entirely included in a country, belongs to the nation that is the proprietor of that country; for, in taking possession of a territory, a nation is considered as having appropriated to itself everything included in it; and as it seldom happens that the property of a lake of any considerable extent falls to the share of individuals, it remains common to the nation. If this lake is situated between two states, it is presumed to be divided between them at the middle, while there is no title, no constant and manifest custom, to determine otherwise."

"What has been said of the right of alluvion, in speaking of rivers, is also to be understood as applying to lakes. When a lake, which bounds a state, belongs entirely to it, every increase in the extent of that lake falls under the same predicament as the lake itself; but it is necessary that the increase should be insensible, as that of land in alluvion, and moreover, that it be real, constant, and complete. To explain myself more fully, I speak of insensible increase; this is the reverse of alluvion; the question here relates to the increase of a lake,

¹ Vattel, *Droit des Gens*, liv. 1, ch. 22, § 171, 172.

² Voet ad Pand. lib. 41, tit. 1, § 15; Instit. lib. 2, tit. 1, § 20; l. 7, § 1, ff. De acquir. rerum domin.

³ Instit. lib. 2, tit. 1, § 12.

⁴ Vinnii Com. ad Instit. et not. Heineccii, lib. 2, tit. 1, § 2, num. 4.

⁵ Pufend. *Droit des Gens*, liv. 4, ch. 7, § 11; Vattel, *Droit des Gens*, liv. 1, ch. 22.

⁶ Vattel, *Droit des Gens*, liv. 1, ch. 18, § 207; Martens, *Droit des Gens*, liv. 2, ch. 1.

as in the other case to an increase of soil. If this increase be not insensible, if the lake, overflowing its banks, inundates a large tract of land, this new portion of the lake, this tract thus covered with water, still belongs to its former owner. Upon what principles can we found the acquisition of it in behalf of the owner of the lake. The space is very easily identified, though it has changed its nature; and it is too considerable to admit a presumption that the owner had no intention to preserve it to himself, notwithstanding the changes that might happen to it."

"2. But if the lake insensibly undermines a part of the opposite territory, destroys it, and renders it impossible to be known, by fixing itself there, and adding it to its bed, that part of the territory is lost to its former owner, it no longer exists, and the whole of the lake thus increased still belongs to the same state as before."

"3. If some of the lands bordering on the lake are only overflowed at high water, this transient accident cannot produce any change in their dependence. The reason why the soil, which the lake invades by little and little, belongs to the owner of the lake, and is lost to its former proprietor, is because the proprietor has no other boundary than the lake, nor any other marks than its banks, to ascertain how far his possession extend. If the water advances insensibly, he loses; if it retires in like manner, he gains; such must have been the intention of the nations who have respectively appropriated to themselves the lake and the adjacent lands; it can scarcely be supposed that they had any other intention. But, a territory overflowed for a time is not confounded with the rest of the lake; it can still be recognized; and the owner may still retain his right of property in it. Were it otherwise, a town overflowed by a lake would become subject to a different government during the inundation, and return to its former sovereign as soon as the waters were dried up."

"4. For the same reasons, if the waters of the lake, penetrating by an opening into the neighbouring country, there form a bay, or new lake, joined to the first by a canal, this new body of water and the canal, belong to the owner of the country in which they are formed. For the boundaries are easily ascertained; and we are not to presume an intention of relinquishing so considerable a tract of land in case of its happening to be invaded by the waters of an adjoining lake."

"It must be observed, that we here treat the question as arising between two states; it is to be decided by other principles when it relates to proprietors who are members of the same state. In the latter case, it is not merely the bounds of the soil, but also its nature and use, that determine the possession of it. An individual, who possesses a field on the borders of a lake, cannot enjoy it as a field when

it is overflowed; and a person who has, for instance, the right of fishing in the lake, may exert his right in this new extent; if the waters retire, the field is restored to the use of its former owner. If the lake penetrates by an opening into the low lands in its neighbourhood, and there forms a permanent inundation, this new lake belongs to the public, because all lakes belong to the public."

"The same principles show, that if the lake insensibly form an accession of lands on its banks, either by retiring or in any other manner, this increase of land belongs to the country which it joins, when that country has no other boundary than the lake. It is the same thing as alluvion on the banks of a river."

"But if the lake happened to be suddenly dried up, either totally or in a great part of it, the bed would remain in the possession of the sovereign of the lake; the nature of the soil, so easily known, sufficiently marking out the limits."

"The empire or jurisdiction over lakes and rivers is subject to the same rules as the property of them, in all the cases which we have examined. Each state naturally possesses it over the whole or the part of which it possesses the domain. We have seen (§ 245) that the nation, or its sovereign, commands in all places in its possession."²

With regard to acquisition by simple occupancy, we must observe that the law of nations agrees with the Roman law in the following respect: The occupation of vacant territories and jurisdiction by states, is grounded on the same principles as the acquisition of private property by occupancy. And territory is not acquired in this way by a state unless the possession has, in fact, taken place, and the act of taking possession has concurred with the manifest intention of appropriating the thing:³ and so, by the Civil Law, the acquisition of things by occupancy must be made *corpore et animo*, that is to say, by an outward act, signifying an intention to possess,⁴ though the outward act of possession need not be by act of physical contact, such as taking into the hand with respect to movables, or treading with the feet with respect to land; for any species of possession, or, as the ancients express it, *custodia*, or some physical act importing ownership, is a sufficient appropriation.⁵ These principles show that a state may take, by occupancy, an entire vacant country, without actual custody

² Vattel, *Droit des Gens*, liv. 1, ch. 22, § 274—278.

³ Martens, *Droit des Gens*, liv. 2, ch. 1, § 37.

⁴ L. 3, § 1, ff. *De acquirenda et omit. Possess.*; Grot. *Droit de la Guerre*, liv. 2, ch. 4, § 3.

⁵ Grot. *Droit de la Guerre*, liv. 2, ch. 8, § 2; *Instit. lib. 2, tit. 2, § 12*; Grot. liv. 2, ch. 3, § 1; Savigny, *Treatise on Possession* (translated by Sir Erskine Perry), book 2, sect. 14, 15, &c.

of each part of it. This is not contrary to the opinion of Vattel given above, that a nation cannot appropriate to herself, by mere taking possession, a country which she does not really occupy—where she has formed no establishment—and far too extensive for her to be able to people and cultivate." This would be taking from other nations that which is no benefit to herself, contrary to natural law.

"All things," says Vattel, "susceptible of being property, are considered as belonging to the nation which occupies the country, and constitute the total or mass of its possessions. But the nation does not possess all in the same manner. Those things which are not divided among communities or municipal bodies politic, or individuals of the nation, are called *public property*. Some of these are reserved for the use of the state, and are the property of the crown, or the commonwealth; while others remain common to all the citizens who use them, each according to his wants, or according to the laws which regulate their use; and these things are called common things. There are others which belong to some body or community; they are called property of a community, *res universitatis*, and they are for the particular body, what public property is for the whole nation. As the nation may be looked upon as a great community, the property belonging to it so that all the citizens may use it, and that possessed by bodies or communities, may be called *common property*. The same rules apply to both. And the things belonging to individuals are called *private property*, *res singulorum*." * The public property may be acquired by the state, either by original reservation, or by other means, such as by gift or other transfer.† And it naturally belongs to the sovereign power to dispose of the public property, but this rule must be understood subject to the diversities of municipal laws and regulations existing in different countries.‡

"Where the revenues of the public property do not suffice, the state supplies the deficiency by taxes and other imposts, which ought to be regulated so that all the citizens may pay their share according to their means, and the advantages which they derive from the state. And all the members of the civil society are bound to contribute according to their power to its welfare and safety; and they cannot refuse to furnish the necessary subsidies required by legitimate authority."§ These imposts are a salary which private persons pay to

* Vattel, *Droit des Gens*, liv. 1, ch. 18, § 208.

† *Ibi*, ch. 20, § 235.

‡ *Ibi*, § 238.

§ *Ibi*, § 237—239.

¶ *Ibi*, § 240; Blackst. Com. b. 1, c. 8, p. 307; Domat, *Droit Publ.* liv. 1, tit. 5.

the state for the defence of their life and property, and a contribution absolutely necessary for the expenses required by the government.^b And we have already seen, that by the right called *dominium eminens*, (which is a part of the sovereign authority, and one of the *jura majestatis*,) the state has a power over all property within it, in cases of necessity, and where such power is required for the public welfare; but where, in the exercise of this power, private property is taken or injured, compensation must be made by the state or otherwise.^c

We come now to the property of bodies politic or corporate, called, in the civil law, *res universitatis*. This class of things were, as Justinian informs us, sometimes called public, as contradistinguished from the property of individuals; for Ulpian says, nothing is public but what belongs to the Roman people.^d They belong to the body as an aggregate person, but are used by the individuals composing it. Such were the theatres, basilicæ, porticos, public baths, and the like, which belonged to a city or other municipal body, for the use of the citizens.^e

Nothing is said in the civil law, under this head, of the patrimony of cities and other aggregate bodies; for, as Gajus informs us, cities (and other communities or bodies corporate) are, in contemplation of law, private persons,^f though they are by the municipal laws of all countries, subject to various regulations according to their purposes in the commonwealth. The use of the several sorts of communities and corporations was, as Domat remarks, natural in the society of mankind, and had the same origin and foundation as the union of many families and of many nations under one and the same government of a monarchy, or of a republic. For as it is the multitude of the wants of men, and the necessity that every one has of the assistance of many others, that has been the occasion of forming monarchies and commonwealths, so the same necessities and wants have required and produced still more close and particular conjunctions of persons together, forming companies and corporations destined to different uses for the public good.^g

By the Civil Law, no communities could be established, except by legal permission.^h The power of erecting a corporation is incident

^b Pufend. Droit des Gens, liv. 8, ch. 5, § 3.

^c Vattel, Droit des Gens, liv. 1, ch. 20, § 244; Bynkershoek, Quest. Jur. Publ. lib. 2, ch. 15.

^d Institut. lib. 2, tit. 1, § 6.

^e Vinnii Comment. ad Institut. lib. 2, tit. 1, § 6.

^f L. 16, ff. De Verbor. Signif.; l. 22, ff. De Fidejussoribus; l. 20, ff. De rebus dubiis.

^g Domat, Droit Publ. liv. 1, tit. 15.

^h L. 1, § 2, ff. De Colleg. et Corpor.; l. 3, § 1, ibi; l. 1, ff. Quod cujus, Universit. nomine; l. 5, § 12, De Jur. immunit.

to a sovereign power;¹ and no association can become a legal person except by the authority of the state; and this important rule is quite independent of the innocent or prejudicial nature of the society.² The essential character of a corporate body or corporation is, that its rights rest, not on the members considered individually, nor even on all the individuals together, but on an ideal whole. An important consequence of this is, that the partial, or even entire change of members, does not affect the essence, nor the unity, of the corporation.³ This is what in our law is called perpetual succession.⁴ Corporations are sometimes called *juridical persons*, because they exist for juridical purposes. "The artificial legal capacity of these persons," says Savigny, "applies to relations of private law. Often the Public Law of the state requires that certain powers be exercised by an assembly or collective unity. But to consider such an unity, such as a college or court of judges, as a juridical person, would be a confusion of ideas; for the essential character of the institution, the legal capacity to possess property, does not belong to most of these assemblies, though some of them, apart from their judicial functions, may have acquired the character of juridical persons. It is also erroneous to regard the uninterrupted succession of sovereigns in a hereditary monarchy as a juridical person."⁵ These collective powers of the Public Law must have been familiar to the Romans, who for so many centuries had a republican government; and in this sense they speak of a college of consuls or of tribunes of the people. Thus they said that the decemviri of a town constituted a unity, and their office was deemed to be exercised by one person.⁶ Even when all the *judices* appointed to decide a case were successively replaced by others, the *judicium* was not thereby changed.⁷ But these expressions and principles were applied only to Public Law, or procedure, and entirely distinguished from the private law regarding juridical persons — a distinction in conformity with the nature of things, and which modern writers have not sufficiently observed. The

¹ Kent, Comment. vol. 1, lect. 12, p. 250.

² Savigny, *Traité du Droit Rom.* tom. 2, p. 158.

³ *Ibi*, p. 241; l. 7, § 2, ff. *Quod cujus*. Univers.; l. 76, ff. *De Judiciis*; Grot. *Droit de la Guerre*, liv. 3, ch. 9, § 1. And see the *Classification of Bodies*, by Pomponius; l. 30, ff. *De Usurp. et Usucap.*

⁴ Kyd on Corporations, vol. 1, Introduction, p. 3; Madox, *Firma Burgi*, c. 2, § 17, p. 50.

⁵ Hasse, *Archiv*, vol. 5, p. 67. It is so in our law; Co. Litt. 43; 10 Rep. 29 b; Plowd. Com. 213.

⁶ L. 25, ff. *Ad Municip.* *Magistratus municipales cum unum magistratum administrant, etiam unius hominis vicem sustinent.*

⁷ L. 76, ff. *De Judic.*; Novell. 134, cap. 6.

classes, centuriæ, and tribes, were also important political unities; but they do not appear ever to have been considered as juridical persons; that is to say, as capable of possessing property in common.⁴ . . . But while we restrict within the domain of private law, and especially the law of things, the legal capacity of juridical persons, I do not mean to say that in reality their capacity is their exclusive or even dominant characteristic. They, on the contrary, have special purposes often very superior to their capacity in private law, and of which the latter is merely an instrument. But all the characters of juridical persons, other than the power of holding property, are foreign to private law." To this subject we shall return.

There are also private associations for various purposes, not incorporated; but the law looks upon them as mere assemblies of individuals having no juridical character of unity.⁵

These doctrines of Savigny show the legal nature of the things constituting the patrimony of bodies corporate, and the reason why with reference to that property they are considered by the civil law in the light of private persons. The goods and rights of a corporate body belong to it in such a manner that none of the particular persons who are members of it have any right or property in them, or can dispose of them.⁶ The management of the property of temporal corporate bodies ought to be regulated and restricted by the public law of the state, because experience shows that the members of those bodies are apt to prefer their own interests to those of the body and to the objects for which it was created. As for ecclesiastical bodies, they are regulated by the laws and principles of the Church.

The fourth and last class of things, not private, remains to be considered; that is to say, *res nullius*. They are thus described by Justinian. "Those things are the property of no one (*res nullius*) which are consecrated, or religious, or sacred: for things that are of divine right belong to no one."⁷ This classification of things is important, from its analogy to the classification of things by the canon law. Things ecclesiastical are generally divided by the canonists into:—I. Things spiritual, which belong immediately to divine worship or ecclesiastical functions. II. Things temporal, which are requisite for the sustenance of the churches and clergy. Things spiritual are subdivided into incorporeal things, such as virtues and gifts of grace, faith, hope, and charity, which belong to theology, and the sacraments;

⁴ Savigny, *Traité du Droit Rom.* tom. 2, p. 234—236.

⁵ *Ibi*, p. 238.

⁶ *Pufend. Droit des Gens*, liv. 7, ch. 2, § 21.

⁷ *Domat, Droit Publ.* liv. 1, tit. 15, sect. 2, § 8.

⁸ *Instit. lib.* 2, tit. 1, § 7; l. 23, § 1, ff. *De Rei Vindicatione*; l. 43, *ibi*.

and also rights, exemptions, advantages and privileges, and other things of like nature; and things corporeal, such as altars and sacred utensils.* The remaining number of the first and general division, that is to say, things temporal, is subject to the same classifications as temporal property.

Corporeal things are subdivided into two classes, things consecrated, sacred or *sacrosanctæ*,—and things religious—*religiøsæ*. The former are dedicated to the exercise of external divine worship, such as churches, altars, and the like; and as they are made inviolable, they are called sacred and holy—*sacræ et sanctæ*. The latter, i.e., things religious (*religiøsæ*) are those which have a connexion with Divine rites, or the duties and functions of the clergy, such as cemeteries, tombs, and houses of refuge for the aged, the sick, and the poor, and other objects of charity, which may be under the government of the Church.†

All these things belong or bear a relation to Ecclesiastical Public Law, by which the government and public administration of the Church are regulated. Ecclesiastical things temporal are also affected, in divers ways, by the temporal laws of the state. And it is the same with things sacred and religious, so far as they partake of a temporal nature. This matter depends on the circumstances under which the Catholic Church is placed in different countries, and on the particular municipal laws existing in each state. Thus in countries where the Catholic Church is not established, but looked upon by the temporal government as a voluntary society; its canons can only take effect in law, as the internal regulations of such society, not contrary to the law of the land. For the temporal courts will only regard them in this light, and thus ecclesiastical things, so far as they have a temporal nature, are brought *de facto*, although not by the will of the Church, under the regulation of the temporal laws. In some states restraints are placed on the acquisition of property for ecclesiastical and charitable purposes, by laws commonly known under the name of laws of Mortmain.‡ And the temporal laws have sometimes assisted the canons to prevent the impoverishment of the Church, by restricting the alienation of ecclesiastical property.§ So in explaining the nature of mixed laws we have seen that many ecclesiastical matters are partly regulated by temporal laws confirming those of the Church, or grounded on the double relation which those matters have to the Church and the civil community. And on the other hand many temporal matters

* Devoti, Instit. Jur. Canon. Tabulæ Synopt. tab. 34; Lancelotti, Inst. Jur. Canon. lib. 2, tit. 1, § 50.

† Devoti, Tabulæ Synopt. ubi sup.; Devoti, Inst. Canon. lib. 2, tit. 1, § 1.

‡ Nardi, Diritto Eccles. tom. 1, § 261.

§ Ibi, § 263.

are partly regulated by laws of the Church, because of their relation to Religion, or to the duties and functions of the Church and ecclesiastical persons.^b Divers privileges have been granted by the Holy See to particular princes and states by concordats and otherwise, whereby they enjoy rights of patronage and protection regarding ecclesiastical things; such, for instance, as that of proposing persons for bishoprics, and appointing to ecclesiastical benefices, dignities and offices.

The doctrine of the Roman Law regarding *res nullius* contains a principle important both in Private and in Public Law. It is this,—that a thing may be actually appropriated, and yet be the property of no person.

Savigny observes that in the early times of Roman history, the need to constitute a juridical person was little felt, because the important thing in the divers associations of priests and artisans and the like, was community of action, and the political position and the capacity of the body to hold property, was matter of secondary interest. For the expenses of the public worship of the Romans were defrayed by the state; and to make a foundation for this purpose, it was sufficient to have the property intended to be given, consecrated. By consecration the thing given was withdrawn from commerce, without becoming the property either of the temple or of the priests. Subsequently, when the state increased in extent, the idea of the corporate character or juridical person applied in an important and clear manner to the municipal communities or towns, to the municipia and the colonies. For they required to possess and acquire property, and their dependant situation rendered them amenable to and suitors before the courts. And the idea of the juridical person once introduced, it extended itself to other cases. Thus it was applied to the ancient confraternities of priests and artisans,—and then to the state itself, under the name of the *Fisc*, which was treated as a person, and subject to a jurisdiction; and afterwards it was extended to subjects of an ideal character, such as the gods and the temples.^c

The latter application received great and numerous extensions under the rule of Christianity. Among the Germanic nations the institution was preserved and still more developed, for it found the bonds of government relaxed, and the minds of men inclined to form free associations of all sorts. In modern times, the centralization of authority has reacted on corporate bodies, and diminished their importance, without changing anything of the essential characteristics of juridical persons.^d These observations of Savigny are the more interesting from

^b Domat, *Loix Civiles, Traité des Loix*, ch. 10.

^c Savigny, *Traité du Droit Rom.* tom. 2, § 87, p. 243—245.

^d *Ibi*, p. 245.

their application to the history of corporations in our own country. For charters of incorporation granted to cities and towns in England did not commence until the reign of Henry VI.; and the technical corporate character was introduced chiefly with reference to the acquisition and tenure of property.*

We may conclude that the juridical person is in reality a fiction. Thus a corporation has been called a "*mere metaphysical being*—a *mere ens rationis*," and has been said to "rest only in intendment and consideration of law."[†] It follows, that the true principle is that involved in the doctrine of the Roman law regarding *res nullius*, that is to say, that things may be devoted and appropriated to a public purpose, without being vested in any person or persons. It is the purpose of a foundation or other appropriation that must be looked upon as the real owner. So we find Fleta distinguishing between the persons constituting a body, and the object for which property was given to it: "In colleges and chapters there always remains the same body, although they all successively die; as it may be said of a flock of sheep, where there is always the same flock, although the sheep successively die off.[‡] Nor does either of them succeed to the other by right of succession, so that the right should descend hereditarily from one to the other; *because the right always remains to the Church, and the Church always remains.*"[§] So, notwithstanding the jealous eye with which our common law looks upon the suspension or abeyance of the freehold, Littleton says, "If a parson of a church dieth, now the freehold of the glebe of the parsonage is in none during the time that the parsonage is void, but is in abeyance."^{||} Thus, during the interval, it is *res nullius*, or not vested in any person, and yet it is property. And by the English law, the property which the parson has in the church is of a different nature from his right over his private property, and even that which he has over the parsonage-house. The property of the parson in the church and churchyard is only for the technical purpose of enabling him to bring actions for injuries to them.[¶] Here, again, is to be seen the principle of the Roman law regarding *res nullius*.

* Merewether & Stephens, Hist. of Boroughs and Municipal Corporations, Introduc. per tot. and pp. 29, 31, 33. And see Manning, Serviens ad Legem, p. 230.

[†] 10 Co. Rep. 32; Treby, Arg. in Quo Warranto case. It has also been called *persona politica*. Com. Dig. Franchise, F. 1.

[‡] This illustration is evidently from the Roman Law (Pomponius); l. 30, ff. De Usurp. et Usucap.; and Paulus, l. 23, § 5, ff. De Rei Vindicatione.

[§] Fleta, lib. 6, ch. 18.

^{||} Litt. § 647; Co. Litt. § 12, 18 b.

[¶] Blackst. Com. b. 1, ch. 11, § 5, 7.

We have now reached the conclusion of these Commentaries. They commenced with a disquisition on the origin and foundation of laws : for the leading idea throughout the whole work is, that, under Divine Providence, the world is governed, and human society constituted, by laws and obligations. That idea applies to society, both in its universality, and also viewed as a great aggregate composed of a number of political communities, in various forms, but all having certain fundamental principles in common. We have shown the way in which laws are consequences, direct or remote, flowing from the two great fundamental laws laid down in the Gospel, on which society is constructed ; and this has enabled us to see the unity of Universal Jurisprudence, and the different sorts or classes of laws or rules which it contains. The uses of those various kinds of laws enabled us to perceive the constitution of society and governments : and these investigations have shown the necessity of the Spiritual Law, and that without it jurisprudence would be incomplete, because it would belong to one part only of the nature of man, and would not contain all the laws which are consequences of the two primary laws on which society is constructed by Divine Providence ; and it would be therefore inadequate to regulate the conduct of mankind, that is, the steps which they take towards the end of their creation. And thus we have seen the effect of the Catholic Church in the economy of general terrestrial government, and the operation of its laws considered as a portion of that government. We have explained both the unity and the diversity of temporal and Spiritual Jurisprudence, and the way in which the latter preserves the great principle of the universality of human society.

So, from the first principles showing the origin and nature and spirit of laws, we have proceeded to the constitution and forms of civil governments, with the organic laws that regulate them. And we have considered municipal laws and governments, both as governing the particular states to which they belong, and also in their relation to the general government of mankind.

The exposition of the principles on which human society is formed, and of the nature and uses of civil communities, has shown us the fundamental doctrines of international law.

This comprehensive system of Universal Public Law has direct connexion with every part of political and legal science. For all political science must be in harmony and accordance with the laws on which human society is constructed and governed ; and though jurisprudence and politics are distinct sciences, yet they form part of one scheme of terrestrial government. And, as we have seen, all laws are derived from the two primary laws, on the foundation of which

society is constituted, and bear relation to the order and the various uses of that society, according to the principles and reasons on which they are grounded. Thus the reader has seen what use may be derived from Universal Public Law in every branch of legislation and public affairs, and the arguments which it affords to combat the theories which, especially in our times, threaten the foundations of society and property, and all the institutions of secondary natural law. Those theories, wild and absurd as they are in the eyes of practical and judicious men, have enough of speciousness to be dangerous; and they must be met by reasons which are to be found in the science of Public Law.

Such are the general views with which these Commentaries have been written. The vast extent and difficulty of their subject rendered the task most arduous: and I must add, that there does not exist a treatise similar to this, either in the English or in any other language. Whether I have justly deserved even forgiveness of the apparent presumption involved in so great and novel an undertaking, time will show. I can now only plead, that it has been accomplished after years of preparation, and with much labour, research, and meditation; and I offer to the world these Commentaries on Universal Public Law, trusting to that indulgence which is seldom refused to a zealous effort for the advancement of learning.



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* Note.—See on the subject of double domicile, *Somerville v. Somerville*, 6 Ves. jun.; *Forbes v. Forbes*, Wood, V. C., 9th Feb. 1854.

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